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Brf. of Pierson for P. E.

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Supreme Court of the United States

OCTOBER TERM, 1900.

No. 129.

THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA, LIMITED, ET ALS.,
PLAINTIFFS IN ERROR,

versus

THE STATE OF LOUISIANA,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

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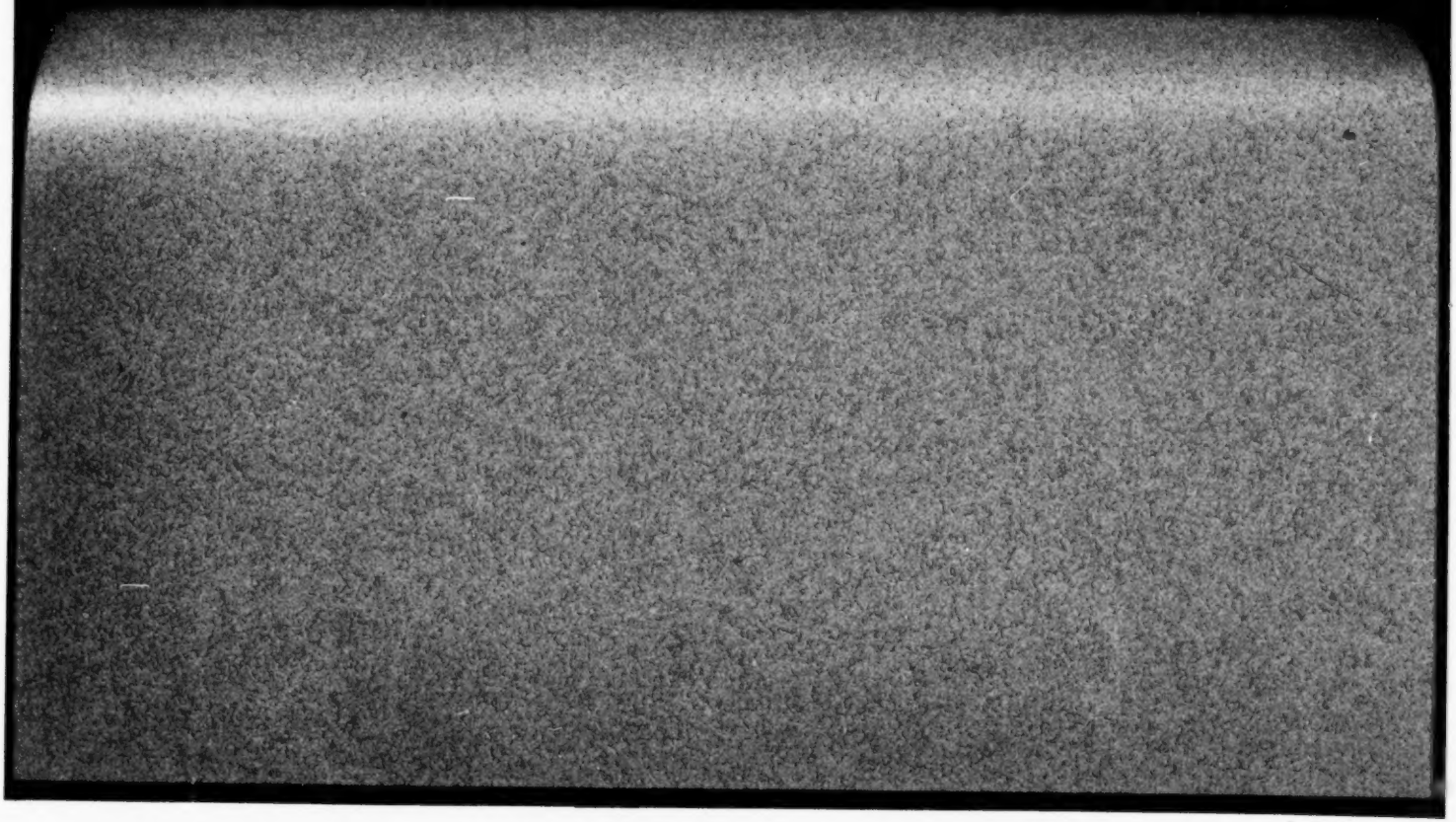

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SYLLABUS.

1. Where appellee files no answer to the appeal, and makes no motion to amend the judgment in his favor, the appeal brings up the case only on the complaint of the appellant, and the court can only pass on that complaint. Suc. Ostrander, 26 An. 451, C. P. 890.
2. The answer must be filed at least three days before *that fixed for the trial,* on the first fixing. Converse vs. Stuart Robinson, 15 An. 434-5.

3. Where the appellee files no answer and makes no motion to amend the judgment appealed from, it cannot be amended in his favor on the appeal. It is then confined to the complaint of the appellant. Talle vs. Monasterio, 48 An. 1234; Gathe vs. Broussard, 49 An. 317.
4. The State can only appear or be made a party to a suit in any civil case, when expressly authorized by law, and when she has a real and actual interest involved. C. P. 15.
5. A reference to the statutes of the State shows that the State can be represented before courts in civil cases by her Attorney-General alone, and even then in proper cases only. State *ex rel.* Hart vs. Burke, 33 An. p. 510.
6. The right of the State by civil action to sue to "annual" or "forfeit" the charter of a corporation is predicated upon the assumption that it has possession of a State "franchise" which the State has the legal right and interest to control and to resume by her suit.
7. The State has no right to sue to "annul" the charter of a corporation, organized under Act No. 36 of 1888, for the pursuit of a purely private business.
8. The Act No. 36 of 1888 of the Legislature of Louisiana, enacted to carry into effect the Art. 247 of the Constitution of 1879, now Art. 275 of the Constitution of 1898, authorizes the pursuit in corporate form of all private business enterprises in this State (except stock-jobbing) under liability limited to the corporate body.
9. The Act is the established public policy of the State on the subject of the organization of such corporations. U. S. vs. Trans. Mo. Frt. Assn., 166 U. S. 340.
10. By the Act the State has relegated the entire subject of their organization to the discretion of persons engaged in private business pursuits.
11. The Act expressly makes it lawful for any number not less than three to constitute the corporation to carry on any lawful business in that form.
12. The discretion is entirely vested in private persons whether they will carry on their private business in that form and with the limited liability therefor under the Act or in some other form of association, such as partnerships or joint stock companies.
13. Private business or enterprises pursued in such form under

that Act are no more matters of public or governmental concern to be supervised by the sovereign power than such private business enterprises are when pursued by private individuals.

14. The State can have no more interest or right to "annul" the charter (which is nothing more than articles of association), in such a case than it would have to set aside the articles of partnership of a commercial firm simply.

15. The legal effect of the Act is to fix and limit the liability of persons engaged in private business pursuits. Such liability incurred by carrying on business only, concerns those so engaged and those with whom they deal. Such liability confers on the State no other or greater rights or interest than that which may arise under any other form of contract.

16. Nor can the State's right to sue in her own name to prevent persons engaged in private business under the Act from continuing in their business, be predicated upon such liability, without extending the State's right to so control all other persons engaged in private pursuits in whatsoever form they may be engaged.

17. The exercise of such control over the private business affairs between the persons so engaged is inconsistent with the civil liberties of the citizen and the rights guaranteed under the 14th Amendment of the Federal Constitution. Allgeyer vs. La., 165 U. S. 589-90.

18. The question whether the relator (the Debenture Company, defendant in the suit No. 56,658) is or not a duly authorized and organized corporation involves only the liability, whether limited or not, of those engaged in the business in the associated name.

19. Such liability concerns only those who hold obligations and liabilities against the association, and they have adequate remedy at their own suit in their own names to enforce their own legal rights. 15 An. 441; 29 An. 369; 33 An. 963; 37 An. 485; 34 An. 534; Williams vs. Hewit, 47 An. 1076.

20. The sovereign State organized for public governmental purposes only, is without any real or actual interest in the pursuit of such private business enterprises between citizens. 117 N. Y. 175; 10 Lawyers' Rep. An. 627-650.

21. The alleged illegality of the business intended to be pursued under the charter includes no right in the State to bring a

civil action to "annul" or "forfeit" such charter, considered as an agreement of association between the incorporators, when no police powers of the State are involved.

22. The rule of law applicable to illegality in contracts or agreements *contra bonos mores* is the maxim, *ex turpi causa non est oritur actio.*

23. In such cases the law refuses any action between the parties themselves, and the State will not lend the use of her name in a suit in the interest of any party to such illegal or immoral contracts or business pursuits.

24. The State's allegation that the sale of debentures by the company, to the debenture purchasers, is illegal, vicious, immoral and *contra bonos mores* brings the case within the rule *ex turpi causa non est oritur actio,* and no action in court can be predicated upon such a contract or upon the agreement to pursue such a business.

25. In an action to declare the non-existence of a corporation and the "nullity" of its charter the non-existing corporate body is not a competent defendant to the action. No such association can appear in court *as a corporation.* It can only sue or be sued in the name of all the members composing it. C. C. 446; Workingman's Bank vs. Converse, 29 An. 369, 371-2; Hincks vs. Same, 37 An. 484, 488-9; Williams vs. Hewitt, 47 An. 1076.

26. Whether such an association can appear in court or become a party to a suit is a question of law, not one of fact with reference to which parties may be estopped for matters *en pais.*

27. The person selected President of a corporation is not thereby special agent for the incorporators or stockholders individually. He is chosen to act for the body only. C. C. 438. And he acts for the corporate body only (C. C. 439); which is different and distinct from all the persons who compose it. C. C. 435.

28. If unauthorized by law or an Act of the Legislature the association enjoys no public character and cannot appear in court except in the individual names of all who compose it. C. C. 446.

29. This action is against the association in its corporate name and capacity only. It is not against the individuals by name who compose it, and the exception that it can not be sued in

that form is "undoubtedly good." Ferally's Case, 34 An. 551; 15 An. 441.

30. The President of the association selected to act for the corporate body only, is not competent to defend in that capacity for the individual incorporators and stockholders, more especially so when they have not been made parties in their own names to the suits.

31. Were the President authorized to represent them in the suit, it cannot be said, that he does so where they are not parties to the suit. He could only represent them by making them parties, and he could only make them parties in this case by intervening in their names.

32. The law (C. C. 446) requires the appearance to be in their individual names, and even if the President were authorized to represent them, there is no appearance in their names in this suit.

33. In a suit by the State alleging the nullity of the corporate charter, the non-existence of the corporate body, praying for judgment to that effect, the alleged non-existent corporate body is not a competent defendant against which judgment can be rendered or enforced. C. C. 446; 29 An. 963; 47 An. 1076.

34. The right to pursue any livelihood or avocation and to make contracts in such pursuits, are ingredients of the liberty of the citizen protected by the 14th Amendment of the Constitution of the United States. Allgeyer vs. Louisiana, 165 U. S. 589.

35. "The business of a debenture-redemption company" specified in the Act No. 171 of 1898, at pp. 407-8, is not an illegal business. It is one expressly recognized by the statute as among the trades, professions and callings pursued in this State and graded by the Act under the Constitution as a basis for the levy and collection by the State of a license tax for its pursuit.

36. Such a business, consisting in the sale and redemption of its debenture bonds or obligations under a system and upon the terms agreed upon, between the company and the purchasers and holders of its bonds is neither immoral, vicious or illegal.

37. An injunction can be obtained by a plaintiff to prevent "an act which he contends may be injurious to him or impair a right which he claims." C. P. 296.

38. Or when it is necessary to preserve property in dispute, to prevent its dilapidation or the defendant from doing some other act injurious to the plaintiff. C. P. 303.

39. The State without interest in the property or under contracts between third persons has no standing to enjoin the private control and administration of the one nor the fulfilment of the other by the third person concerned.

40. A preliminary injunction, issued *ex parte* at the institution of the suit and subsequently dissolved and set aside *in limine litis* by interlocutory judgment of the court, cannot, in the same suit, be subsequently applied for *ex parte* by the same plaintiff, or granted by the court. 19 An. 6; 47 An. 700-1.

41. The preliminary injunction cannot be applied for or issued in a suit after evidence on final trial is closed, argument made and the case submitted.

42. After all incidental questions decided, the evidence of both parties adduced and the argument commenced, no witness can be heard nor proof introduced except by consent of parties. C. P. 484. It is then out of order to raise preliminary questions of injunction after defendant is cut off from making pleas and proof to dissolve it. 32 An. 396; 34 An. 325.

43. The suit by the State to annul or forfeit the corporate charter does not authorize the court, at the instance of the State, without real or actual interest, to enjoin the members of the company from administering the property or the contracts made, in the way adopted between themselves.

44. The nullity or forfeiture of the corporate charter does not involve the forfeiture of the property used or contract rights made in the name of the company, or their administration by those in interest. 15 An. 541; 37 An. 489; 51 An. 1; 24 So. Rep. 629; 117 N. Y. 175-190; 10 L. R. A. 627-650.

45. The corporators are not bound by the citation issued and served in this case. No citation has been issued to or served upon them, either to appear individually or through an agent. The defendants could not be proceeded upon by a citation not addressed to them. Belard vs. Gebelin, 47 An. 166.

46. A court can presume nothing with respect to a party being cited; nothing will cure defect of citation or want of service, except appearing and answering to the merits. 5 N. S. 161; 1 Rob. 30; 13 An. 374.

47. It is well settled by the amplest authority that a judgment rendered against a party who has not been cited and who has not appeared, is an absolute nullity, which can be invoked, not only by the party, but also by any one interested. Bledsoe vs. Irwin, 33 An. 618.

48. A judgment rendered against a person without citing him in the ordinary manner, without his appearing, or anything deemed equivalent to citation or appearance, is utterly void and imports such absolute nullity that any one interested may have it pronounced. 24 An. p. 253; 6 L. R. 577; 9 An. 496; 13 An. 150.

49. The State is a government of fixed laws, rules and regulations under which the energies of the government are exerted for the enforcement of individual rights and the redress of civil wrongs, under rules and regulations provided for that purpose and such personal rights and civil wrongs are to be enforced by and in the name of those interested.

50. Proceedings by and in the name of the State to enforce civil rights of private persons are unauthorized by law and such proceedings by the State are not due process of law within the meaning or intendment of the 14th Amendment to the Constitution of the United States.

51. A corporation not authorized by law or not organized according to law, is without corporate existence; cannot sue or be sued, nor appear in a court of justice as such. C. C. 446.

52. A suit by the State against an association in its corporate name and capacity as the sole defendant, to declare its charter null and void, is a suit without a defendant and is not due process of law.

53. Such a suit could be brought alone against the persons by whom the corporation was sought to be organized. C. C. 446. If they fail to constitute a body corporate there could be none to act as a defendant in such a cause.

54. Due process of law means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs. Definition by Story, J., 118 U. S. 370.

55. It means one in the due course of legal proceedings, according to those rules and forms which have been established for

the protection of private rights. 92 U. S. 481. It must be according to the modes of proceeding applicable to the case in hand. 96 U. S. 105; 92 U. S. 480.

56. By due process is meant one which following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law and adapted to the end to be attained, and must give to parties to be affected an opportunity to be heard upon the justice of the judgment sought. It implies more than the mere issuance of process and includes the right of being heard in the defense of the action brought. Marchant vs. Penn. R. Co., 153 U. S. 387.

57. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. Hovey vs. Elliot, 167 U. S. 414; 11 Wall. 259.

58. Conceding the non-existence of the corporate capacity, the corporators are entitled to their rights of property in what may have been acquired in the corporate name. 15 An. 541; 37 An. 489. The expiration of the charter does not carry with it the destruction of the ownership of the property which the corporation held during its existence. 51 An. 1; 5 An. 741.

59. An *ex parte* injunction issued preliminarily by an order granted *ex parte* enjoining the persons in charge of property of an association not incorporated, in a case the trial of which has been concluded before the court and the perpetuation of such an injunction in a final judgment signed six days afterwards without notice to or hearing by the parties in possession of the property, is unauthorized and not due process of law, when by the effect of such an injunction such persons are divested of their right and power to possess and control the property in their possession. Such a judgment is not according to the modes of proceeding applicable to such a case, nor does such proceeding follow the forms of law appropriate to the case, nor is it in conformity with the ordinary mode prescribed by law.

60. The debenture business is not illegal in the State of Louisiana, it is expressly authorized by the Act 171 of 1898, at pp. 407-8, wherein the Legislature expressly authorizes its pur-

suit by the levy of a graduated license tax for its pursuit in the State.

61. The Act is the established public policy of the State on the subject of the right to pursue such business. U. S. vs. Trans. Mo. Frt. Assn., 166 U. S. 340.

62. The Act No. 36 of 1888 is express legislative authority to the incorporators to organize and constitute the corporation in this case, under the charter which they adopted; it is the public policy of the State on that subject and the incorporators who avail themselves of the privilege of organizing under the Act, had the legal right to constitute the corporation, and the courts of Louisiana are without jurisdiction or legal right to divest them of such legal privilege.

63. The privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, embraces the right to make all proper contracts in relation thereto. Allgeyer vs. Louisiana, 165 U. S. 590. And authorities there cited.

Statement of the Case.

The State, defendant in error, as the sole complainant, by her Attorney General, brought this suit in the Civil District Court of the city of New Orleans, against "The New Orleans Debenture Redemption Company of Louisiana, Limited", an association claiming to be a corporation organized under the laws of the State. The association alone was sued and summoned in its corporate name, as the sole party defendant in the action.

A copy of the association's charter and amended charter, under which it claimed its corporate capacity, were annexed to and made a party of the State's petition.

The object of the State by the suit, which is to be sought in the prayer of the petition, is to establish and declare primarily, the nullity of the defendant company's charter, and in the alternative that, if the nullity be not declared, then that the charter of the company be declared forfeited; and ancillary to that relief, that the company be enjoined *pendente lite* from doing business under its pretended charter, and that it be enjoined from declaring forfeited or lapsed any rights of its debenture or certificate hold-

ers by reason of the failure to pay installments during the pendency of the suit. (R. 4.)

We view the character of this action as being determined by the nature and character of the relief sought in the petition.

To determine the grounds upon which the State claims to be entitled to this relief a comprehensive analysis of the State's petition is requisite to a proper conception and appreciation of the grounds of the action and the legal principles involved in its determination.

In this analysis, care is rendered the more necessary by the form in which the petition is drawn, the incoherent statement of the grounds for the action and by the indiscriminate intermingling of facts alleged, with conclusions of the pleader drawn from them.

The petition does not contain a "clear or concise statement of the object of demand" as required by the fourth paragraph of the Article 172 of the Code of Practice of the State.

Although lengthy and embracing in the relief sought, in the alternative, two separate, distinct causes of action, the petition is constructed in a single sentence and includes one continuous line of adjuncts and phrases, indiscriminately thrown together without any distinction made between the grounds alleged as the basis for the "nullity" demanded and those for the forfeiture of the charter prayed for in the alternative. Also, it intermingles and blends with obscure facts stated, inferences and deductions drawn from them, rendering it thus difficult to get at the precise facts or specific grounds upon which either the "nullity" or the "forfeiture" of the charter is demanded or to distinguish in the petition between the separate grounds laid for these two contradictory causes alleged.

The case having gone to trial in the District Court for the Parish of Orleans, where a definitive judgment was rendered in favor of the State (R. 389), "decreeing the pretended charter under color of which said defendant claims corporate existence to be null, void and of no effect", and in which it was further decreed "that the President, Secretary and General Manager and the officers, agents, directors, stockholders and members of said so-called corporation are and have been without legal authority to act in cor-

porate capacity in the name of said N. O. Deb. Red. Co. of La., Ltd., and under color of its pretended charter." The appeal having been taken from that judgment by the defendant, in which it was joined by various stockholders of the association, to review that judgment the case was heard and determined in the Supreme Court of the State.

The nullity of the charter on the trial of the appeal in the Supreme Court was alone at issue. There was pending on the appeal, no issue in relation to the "forfeiture" of the charter, because the State did not ask for any amendment of the judgment of the lower court in the event that the nullity should fail to be sustained, and not having done so, the entire issue upon that trial turned upon the question of whether the judgment appealed from should be affirmed or reversed in relation to the "nullity" of the charter demanded. It is therefore necessary with some care in the analysis of the petition to distinguish between those allegations in the petition upon which the demand for the "nullity" of the charter is based and those which relate only to the "forfeiture" *alternately* demanded.

It will be conceded that a charter, which is so absolutely null as the judgment of the District Court decreed this charter to be, is not susceptible of being forfeited. Such a nullity implies the non-existence of the charter, and that cannot be forfeited which does not exist. Hence on the trial of the errors assigned in this case we eliminate all allegations contained in the petition which relate to the "forfeiture" of the charter, and we limit the case here to those allegations alone which support the prayer of the petition for the "nullity" of the charter demanded. This will be necessary in order that the true character and nature of the case may be properly understood when we come to apply those principles upon which the assignment of error in this case are predicated.

Returning now to the petition, the principal facts upon which the nullity is demanded appear to be included in the allegations principally in the early part of the petition, which are as follows, to-wit:

"That the said company is not organized for any purpose "for which the law authorizes the formation of corporations; "that same is a debenture company *formed for the sole pur-* "*pose of selling or borrowing money upon its own obliga-* "*tions or debentures* (our italics),to be paid for by monthly "installments, which the company binds itself to redeem at "a profit of 50 per cent. on the amount invested, which the "company is without the means or capacity to do except "through the continued payment of installments by new "purchasers of its debentures, whose money is used to take "up the older debentures, lapses and forfeitures on account "of inability to pay monthly installments on the part of hold- "ers of older debentures; that said entire system is not le- "gitimate, but is vicious and unjust and must necessarily "fail within a more or less limited time."

The other allegations, scattered through the body of the petition, are in the nature of inferences and deductions from the face of defendant's charter and the nature and character of its business, and such as relate to:

The terms of the contract of sale of the debentures between the company and its patrons and the liability of the purchasers of debentures, through poverty or inability to pay installments under the contract, to lose half their investments under the terms of the contract;

The alleged failure of the Act No. 36 of 1888 to provide a mode for the organization of corporations and the alleged absence of any general law in the State for that purpose;

That the whole object is *in effect* gambling, tending to encourage gambling among the people, and is hence contrary to the Art. 172 of the Constitution of 1879, and therefore the Legislature did not intend to authorize corporations for said purposes; that the company carries on no business within the meaning of the Act; that, if it is a business at all, it is a stock jobbing one, which is prohibited; that the company is bound to fail under its system of business; that the larger the business it does the larger and more widespread will be the resulting losses, and that it is oppressive,

and will work great loss and injustice to the people and give just cause for public scandal and other such like allegations.

We do not understand by such allegations that it is charged as matter of fact, that the company has ever entered into an aleatory contract; laid a wager, made a bet, or that it ever actually engaged in any game of chance or staked any sum or value upon the happening of any uncertain event or that the company by such allegations is brought within the meaning or intendment of the law prohibiting gambling. At least no charge of any such is contained in the petition.

The allegations on these subjects seem to be confined to the effort, to give by construction, to defendant's charter and amended charter, a character to the business of the company, different from that imported in the charter itself, and the one ostensibly intended by the incorporators.

Neither do we understand the petition to charge that the company ever engaged in the business of speculating in—buying or selling for profit—stocks, bonds or government securities or other business included in that of a stock jobber. Taking the business of the company as that imported by its charter the distinction between the debenture business pursued by the company and that of the "stock jobber" is too obvious to admit of dispute.

The debenture business of the defendant company as established by the charter has for its principal object, the administration of trust funds under a co-operative system, intended to secure to the investors, the full investment with a profit of 50 per cent. at redemption, whilst the business of the "stock jobber" is to speculate on his own account and in the interest of himself with his own funds in the purchase and sale of stocks, bonds and government securities. The conclusions alleged in the petition that the business which the company is engaged in is either a gambling or a stock jobbing business are without foundation and exist only in the fertile imagination of the pleader.

From the tenor of the petition as a whole we were at one time inclined to believe that the intention by the petition was to charge

in effect that the incorporators were a lot of unscrupulous people, who intended by the organiaztion, to beguile the public, to entrap the unwary, to defraud their patrons, and to filch the funds of investors without any intention to make any redemption to the debenture holders either of the principal invested or the profits promised. The answer of the company in the court of original jurisdiction was drawn to meet that view and to join the issue squarely upon it so as to open the door to a full investigation on these subjects. The State, when the case came to trial, declined to accept this view and offered no evidence on these subjects. The defendant, however, in the cross-examination of Gordon S. Orme (R. —) sought to make an investigation on the subject of the character, motives and *bona fides* of the incorporators, and the State declined to open up the investigation on these subjects or to permit the defendant to do so, but excluded the subject from the defendant's testimony on the following objections which she made, viz:

> " At this point of the proceedings counsel for the State ob-
> " jected to the introduction of this evidence upon the ground
> " that it was generally irrelevant to the issue presented. (R.
> —).

This objection was repeated by the State during the cross-examination of the witness, J. P. Williams, called by her (R. 181, 182, 183). The evidence objected to by the State related to the motives and objects of the organizers of the company and was upon the subject of whether or not they acted in good faith with honest intentions in adopting the charter, and the objection by the State, that such testimony was irrelevant to the issue presented by her in the petition, is equivalent to the concession that the incorporators acted, in the adoption of the charter and the organization of the company, in good faith and with open and upright intentions. No other conclusion is consistent with the State's position that testimony to show the intentions and good motives of the organizers is irrelevant than the concession that they acted with such motives and by which objection the State waived the right to show that the incorporators were actuated by any other or different intentions or

purposes. We may, therefore, eliminate from the petition all those allegations in it that the business of this company is in effect gambling, or that it is a stock jobbing business, prohibited by the Act No. 36 of 1888. The only grounds left in the petition in relation to the nullity alleged may be reduced to two grounds substantially set up, to-wit:

That the company is not authorized by law; that it is organized for the sole purpose of borrowing money upon its own obligations.

The first relates to the form of organization and involves the contention in the petition that the Act No. 36 of 1888 is not a complete or valid law because it does not provide for a mode of organization of corporations, and because this particular corporation is not provided for by the general laws or any other law of the State. The latter ground relates to the interpretation put upon the charter by the pleader that the business for the pursuit of which the company is organized involves a gambling scheme, tends to encourage a spirit of gambling, is vicious and unjust; that it must fail sooner or later, to the loss and prejudice of those who are induced to deal with it, and that the purpose and business are *contra bonos mores*, against public policy and are null and void; that if it is not a gambling scheme it is a stock jobbing business.

Writ of Injunction.

In the original petition the State prayed that the company, "its President, Secretary and General Manager, its officers, agents, directors, stockholders and members be enjoined from acting as a corporation and from doing business under its pretended charter; that it be enjoined from declaring forfeited or lapsed any rights of its debenture holders by reason of their failure to pay installments during the pendency of the suit." (R. 4.)

Upon the *ex parte* affidavit of the Attorney General "that all the facts stated and allegations made in the petition are true and correct to the best of his knowledge, information and belief"; the judge of the District Court ordered "that a writ of injunction issue as prayed for." (R. 4.)

On the following day, May 21, the defendant company through its counsel, suggested to the court that defendant was enjoined from performing any acts under their charter which was still subsisting and valid and before the judicial decree thereon, and on suggesting further that the injunction operated a great injury to the company; moved the court for an order—after notice to the Attorney General—empowering it to release the injunction on bond. (R. 6.)

This motion was tried contradictorily May 25, and on the 26th the court ordered "that the rule * * * be made absolute in so far as to order that the injunction be dissolved and set aside; without prejudice to plaintiff's rights on the final decision of the case." (R. 6, 7.)

On May 31st, the defendant company appeared and filed a series of exceptions to the suit, which are as follows, namely:

"1st. That the Sovereign State of Louisiana is not rightfully or lawfully a party in or to any or all matters or things set forth or alleged in the petition therein filed and is without interest in the subject-matter of this suit.

"2nd. That the State in its sovereign capacity cannot, without express authority of law evincing her consent, be brought into court or be made a party litigant in any civil proceedings, and can be only in cause in which she is a real party and has an actual interest.

"3rd. That the petition does not set forth or exhibit any cause of action in the plaintiff or right in law to the relief therein sought or prayed for.

"4th. That the issues raised and the matters involved in the petition filed herein relate exclusively to purely business pursuits and avocations by and between citizens in their private character and dealings expressly sanctioned and permitted by the Constitutional and general laws of this State and by the said Act No. 36 of 1888, which does not involve the exercise of any public franchise or function of any public nature or pertaining to any publi cor sovereign rights or powers of the State.

"5th. That the said Act No. 36 of 1888 does not include or confer the exercise of any public function or franchise

"by the associations therein provided for, but relates exclus-
"ively to the right to carry on any lawful business or enter-
"prise (except stock jobbing) in the manner and form there-
"in provided for, without personal liability against the indi-
"vidual stockholders so engaged. Such exemption from lia-
"bility under said Act is a matter which relates to and con-
"cerns only the contractual relations and obligations by the
"individual stockholders with debenture-holders and cred-
"itors of the defendant company, who are the sole parties in
"interest, and these cannot be adjudicated or regulated at the
"suit of the State or without the complaint and presence of
"the parties in interest." (R. 7 and 8.)

On November 18, the defendant company filed the following additional exceptions, namely:

"1st. That the plaintiff in this case has cumulated various
"separate and distinct grounds and causes of action in the
"petition which are contrary to, inconsistent with, and ex-
"clusive of each other.

"2nd. That the proper parties have not been made or
"joined as defendants in this suit to defend the same or
"against whom any judgment can be rendered or made ef-
"fective.

"3rd. That the petition sets forth no interest in the plain-
"tiff, the State, and no right to bring this suit or to stand in
"judgment in this case." (R. 9.)

These exceptions were heard and taken under advisement by the court on Nov. 18. They were overruled by the court on January 2, 1899, in a lengthy written opinion contained in the record, pages 11 to 27 inclusive.

On January 3rd, the State pursuant to the suggestions of the court presented and filed a first supplemental and amended petition (R. 27-28), in which the State recognized at least inferentially that "defendant company" was the sole defendant in the case. This supplemental and amended petition relates exclusively to the issue of capital stock by the company alleged to have been, in effect, done without the cash payment therefor by the stock subscribers; and as such this supplemental petition, exclusively relates to the alternative demand, in the petition, for the for-

feiture of the company's charter under Art. 226 of the Constitution of 1898 of the State, corresponding with Art. 266 of the Constitution adopted in 1879, which provides:

> "No corporation shall issue stocks or bonds, except for "labor done or money or property actually received, and all "fictitious issues of stock shall be void, and any corporation "issuing such fictitious stock shall forfeit its charter."

On January 16, 1899, the company as the sole defendant, appeared and filed, in its corporate name and capacity, the answer (R. 29-31), in which it averred "that it is a duly and legally constituted private corporation, organized in conformity with the laws of the State and expressly authorized by the said laws, especially by the Act No. 36 of 1888 of the General Assembly for the pursuit of the business and enterprise set forth in its charter."

That it was so created and organized by notarial act on the 25th September, 1894, by the twenty stock subscribers by whom the act was made and executed, and who entered into said contract and executed the act under advice of competent counsel for the purpose, and without any intention to deceive, injure or defraud any one, either by themselves or through the instrumentality of the company, but with the *bona fide* purpose, in an honest and honorable way, to carry on the business and enterprise, set forth in the act, in corporate form, under the laws and statutes of the State. That the incorporators were respectable and responsible men, residents of this city and State, who had subscribed each to twenty-five shares, amounting in all to 500 shares, representing $50,000 in capital stock of the company, which they afterwards paid over to the company in good faith; that in the issue and delivery of the stock to them the company acted in good faith, and upon full payment therefor.

That the company was formally and duly constituted, its proper officers and agents and employees selected, authorized and installed, and was organized as an active corporation under the act; that it has since been in the active and public pursuit of its corporate objects and business, not only with the citizens of this city and

State, but with citizens of other States of the Union and others, in the sale of its debentures in accordance with the plan provided in its charter.

That the company has pursued its business without fraud, or intent to defraud any one, or any of its customers or patrons, in any way; that it has never failed or defaulted in any of its contracts or obligations, but has at all times since its organization promptly met and complied with its every obligation without complaint from any person or creditor, and that it is still able to so conduct and carry on its business.

That at the time of the institution of this suit it had outstanding contracts with numerous different customers, patrons and debenture holders, involving large and important trusts, and large sums and amounts which were regulated by the specific contracts made and existing between it and its customers and dealers, all of which are and were legal, valid, and binding, between the contractants; that neither the plaintiff in this case, nor defendant can, in this suit or proceeding, alter, amend or in any manner divest such contracts as between the parties thereto; that none of the contractants have complained or expressed any dissatisfaction to the company with any contract, but to the contrary all of its debenture holders, in their own interest, express the desire that the contract shall, in every case, be complied with.

But it denies that there is any semblance of gambling or wager of any kind in any contract or transaction had by it, or that it ever intended to enter into any contract or transaction including any element of chance, not inherent in other ordinary or non-gambling contracts, and it denies that its business, or pursuit, is in any sense a gambling game or scheme, or that the same is vicious or immoral, but that all its contracts and transactions, in their legal aspect or character, do not differ from those ordinarily made in other lawful pursuits.

Finally, it avers it was organized by its stock subscribers who acted in good faith in its organization for the pursuit of its business in a lawful way; that said business is a lawful avocation and

enterprise, which is neither denounced by the laws or the statutes of the State, nor one inherently immoral, vicious or *contra bonos mores;* that in pursuit of its business it has acted without injury or fraud to any one, or the intent to do so, but it has at all times, and in all transactions, dealt in good faith and fairly with all persons, and promptly kept all its contracts and agreements and fulfilled all its obligations, and in none of which has it ever intentionally or knowingly violated any law of the State or provision of its charter or amended charter.

Subsequently the defendant company tendered, and with the leave of the court, filed on January 31st, it's supplemental answer (R. 31-32) in which it made the following special averments, viz:

> " It avers that the stock subscribers and incorporators by whom the original charter for this company and by which it was created and constituted a corporation was agreed to and adopted, were expressly and specially authorized thereto by the laws and statutes of the State, and especially by the Act No. 36 of 1888 of the General Assembly thereof.
>
> " That the business calling, and avocation for the pursuit of which it was so created and constituted a corporation is a lawful business or enterprise, open to pursuit in any lawful way by any person or citizen; that said business is not an immoral one or one *contra bonos mores,* nor one prohibited or denounced by law, either of this State or of the Federal Government, but same is a legal and lawful business, recognized by the plaintiff, the State of Louisiana, in the Act No. —— of the General Assembly thereof of 1898, and as such is licensed by the State.
>
> " That the purpose of this suit is to deprive the defendant, a duly and legally organized corporation under the laws of the State, of the legal right to engage in or pursue the same in any manner; that this suit as instituted and prosecuted is for a purpose and has for its object one which is in violation of the Constitution of this State, in that it deprives the defendant of its property without due process of law and denies to this defendant the equal protection of the laws of the State of Louisiana and of the United States, and that said object and purpose is in contravention of the Constitution of the State of Louisiana and of the Constitution and amendments there-

to and the laws of the United States, in that said object and purpose is intended to deprive this defendant of its lawful right to pursue a lawful business, calling, or avocation, and said object and purpose is an unlawful discrimination against this defendant corporation and a denial to it of the equal protection of the law in the pursuit of its business."

Upon these issues the case went to trial on the merits and the hearing of the testimony was begun on January 31st (R. 33) and concluded on February 9th, 1899 (R. 224 and 226). The case was then postponed for argument until March 2nd.

After the argument had been concluded and after the oral opinion of the court had been delivered on March 2nd, a second supplemental petition for the State was presented (R. 385 to 388) and allowed by the court (R. 389); in which the State, upon new averments of law and fact not theretofore involved in issue when the testimony was taken and the argument heard; and thereby introducing new issues of both law and fact, after a final trial of the case had been concluded, prayed for another *ex parte* injunction *pendente lite* upon the *ex parte* affidavit of the Attorney General that "the facts stated and allegations made in the supplemental petition are true and correct to the best of his knowledge and belief" (R. 388); enjoining the company, its officers, directors, agents and representatives "from acting as a corporation; from removing the assets and funds (of the company) from the State of Louisiana or beyond the jurisdiction of the court, directly or indirectly or from making any arrangements or negotiations for that purpose; from receiving money or installments on its debentures from any debenture-holder, paying out as surrenders or withdrawals or making loans on said debentures; from forfeiting any of the debentures or rights of its debenture-holders for the non-payment of installments—all until the further orders of the court." (R. 388.)

The grounds for this posthumous injunction set out in this second supplemental petition filed, after the case had been finally tried, are to the judicial mind, extraordinary and novel, irrelevant and wholly inadmissible in any stage of the case.

The grounds set up relate more to suits by the State against debenture companies other than the defendant, and such averments as, that several of them had disappeared or dropped out of existence since the suits brought against them; that other companies had transferred "bodily" their assets to other States to escape an administration of their affairs by the State under the supervision of the court; that still others had conspired and negotiated with other companies organized out of the State in order to defeat the ends of justice; that in other cases before the court the State had shown conclusively that negotiations were being actively conducted between foreign debenture companies and the Cincinnati Debenture Company of the city of New Orleans, by which it was shifting its assets out of the State; that this was being done after the suit against the company had been tried and submitted, and that an injunction had been issued against one home company and afterwards against the Cincinnati Company prohibiting such proceedings; that a large portion of the community was interested in these companies; that recent developments in cases where several of these companies were exposed in court their true character had given cause for much public scandal and loss to the people; that several companies had been placed in the hands of receivers who found little left to satisfy creditors, and other such irrelevances, whereby it appears that the effort was made to saddle off on the company defending, all the alleged delicts of all the delinquent companies in the community and that too without any allegation that the defending company was in any manner connected with or responsible therefor. The only allegation in this lengthy petition at all relating to the defendant company is the illogical and sweeping charge which reads:

> "That the said New Orleans Debenture Redemption Co. of La., Ltd., is herewith specially charged as being guilty of each and every one of the aforesaid allegations, and that though specially charged with gross insolvency, with doing business of a gambling character under the pretense of a charter, it continues to receive monthly from its debenture holders their installments of money due on debentures, prom-

ising to return the same with 50% profit, which its officers know it has not the means or capacity or will ever have the means or capacity so to do, but that said debenture holders by the terms of their illegal contract are compelled to keep up said monthly payments or undergo the penalty of losing at least half of all amounts previously paid by them; that according to the evidence in all the cases heretofore tried the best and most honestly administered company is not worth fifty cents on the dollar, and it is wrong to allow holders to continue to pay monthly installments of which we know they are bound to lose at least one-half the amount paid in on their debentures.

"Petitioner represents that all of said acts complained of would work an irreparable injury to said creditors and debenture holders and to plaintiff in this regard, whose duty it is to see that a citizen and the public are not imposed upon under the color of a State franchise, and therefore warrant good cause for the issuance by this honorable court of its writ of injunction to conserve the assets within the jurisdiction of this court during the pendency of the proceedings herein, to the good of the commonwealth and the creditors and debenture holders of said company." (R. 387-388.)

Upon this supplemental petition and the *ex parte* affidavit of the Attorney General made on February 20th, 1899, the court on March 2, 1899, granted the second preliminary injunction by the following *ex parte* order:

"It is ordered that this supplemental petition be now filed, and that a writ of injunction do issue herein, prohibiting and restraining the New Orleans Debenture Redemption Company of Louisiana, Limited, its officers, directors, agents, and representatives, from removing the assets and funds of said company from this State or beyond the jurisdiction of this court; from paying any money or instalments to its debenture holders; from paying any money on surrenders or withdrawals or in redemption of debentures; from making loans on and from forfeiting any of said debentures or the rights of any of the holders thereof until the further order of this court.

"New Orleans, March 2, '99.

(Signed) "F. A. Monroe, *Judge*." (R. 389.)

But before this injunction was granted or issued the court on the same day, March 2, at the conclusion of the argument, had rendered an oral opinion and rendered judgment in favor of the State, declaring the charter of the defendant company null and void, and accordingly judgment was entered for the State on March 2, 1899. (R. 390.)

On March 6, 1899, the defendant company through its counsel appeared and made a formal application for a new trial on numerous grounds elaborately set forth in its application and contained in the record, pages 390 to 394 inclusive, to which reference is made for the specific grounds on which the application was based. The application was refused on the same day. (R. 394.)

On March 8th formal judgment was written up and signed, the decree of which is as follows:

> "It is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, the State of Louisiana, and against the defendant, the New Orleans Debenture Redemption Company of Louisiana, Limited, decreeing the pretended charter, under color of which said defendant claims corporate existence, to be null, and void, and of no effect.
>
> "It is further adjudged that the President, General Manager and the officers, agents, directors, stockholders, and members of said so-called corporation are and have ever been without legal authority to act in a corporate capacity in the name of said New Orleans Debenture Redemption Company of Louisiana, Limited, and under color of its pretended charter.
>
> "It is further ordered that the injunction heretofore issued, prohibiting and restraining said company, its officers, directors, agents, and representatives, from removing the assets and funds of said company from this State or beyond the jurisdiction of this court, from receiving any money or installments from its debenture-holders, from paying out any money on surrenders or withdrawals or in redemption of debentures, from making loans on and from forfeiting any of said debentures or any of the rights of any of the holders thereof, be now confirmed and made absolute; and is further ordered and adjudged that said company, so called, its offi-

cers, agents, representatives, and members be further perpetually enjoined and restrained from acting in a corporate capacity." (R. 389-390.)

It will be noted that the injunction perpetuated by this judgment, signed on March 8, was granted and issued on March 2, under a supplemental petition and *ex parte* affidavit filed after the final trial of the case had been had; that it was perpetuated not only against the company, the nominal defendant in the suit, but that it operated personally against the "officers, directors, agents, representatives and stockholders" of the company, who were third persons, not parties to the action in which the writ issued; and who, under the Art. 446 of the Civil Code, could not, under the theory of the State's suit, that the company was not a corporation, be proceeded against, except in their individual names. It will be noted also that the legal effect of the injunction, perpetuated by this judgment, was to divest the company and the individuals composing it of the control of the common assets and property held by them and to bring the assets and property under the immediate control of the court without any judicial custodian or receiver appointed or authorized to care for the property.

It will be further noted that the supplemental petition under which the injunction was claimed and issued was not filed till March 2, after the final trial of the case in which it was applied for and not until final judgment had that day been entered in favor of the State decreeing the nullity of the company's charter and its non-existence as a corporate body, and that the injunction was applied for an issued as a preliminary or conservatory remedy "until the further order of this court" (R. 389), after the final disposition of the principal cause of the action had been adjudged, and that the filing of the supplemental petition at that stage of the action was in plain violation of the rules of proceeding provided for in the Code of Practice and the settled jurisprudence of the State existing on the subject and established by the following authorities:

United States vs. The Bank of United States, 11 Rob. 418.

(Sylabus): "Under no circumstances can a supplemental answer be permitted to be filed, after the evidence has been concluded."

On page 428 of the opinion the court, on this subject, said:

"The first is, to permitting W. W. Frazier to file what is called a supplemental answer about a week after the trial of the case had commenced, when all the evidence seems to have been received, and, in fact, on the very day the judge filed his reasons for his judgment. It was objected to as presented too late, and because it had no connection with the original answer, or the matters at issue. We think the court below erred in permitting this document to be filed. It was certainly too late. Every issue should be made, and all answers filed, before the trial commences. It must be an uncommon case, to justify the filing of an amendment, or supplement, to the pleadings during the trial; *and after the evidence is finished, it cannot be permitted.*" (Our italics).

In the case of the Succession of Reagan, 12 An. p. 117, in the body of the opinion, on this subject, the court said:

"The plea presented on the 13th of July, 1855, declares that the appellant had discovered the facts therein set forth, on the 7th of the same month or six days previously to her calling them to the notice of the court. It is obvious what confusion would be introduced into the trial of causes if such a practice were tolerated as to allow new issues of fact to be thus kept in reserve until the evidence was closed and the argument had commenced. Such new issue, if entertained, would require new evidence to substantiate the affirmative; and the opposite party could not, of course, be refused the right of producing evidence to rebut. The case might be different were the fact pleaded, one which had just come to the knowledge of the party pleading it."

It will be noted that the affidavit made by the Attorney General for the injunction was made on the 20th day of February, 1899 (R. 388), and that the petition was withheld until March 2, when the order was applied for and granted and the petition filed.

In Case, Receiver, vs. Watson, 21 An. p. 351, the court said:

"It has been frequently decided by this court, that an answer cannot be amended after the case had been called for trial." And citing numerous authorities.

In Burbank vs. Harris, 32 An. p. 396, the Court, in the opinion, said:

"After the exception (of no cause of action) had been considered and sustained, the plaintiff moved for leave to amend her petition by alleging ownership, which was refused. It was then too late. The amendment was not offered until after judgment, and was, obviously, beyond the power of the court to consider in the then condition of the case. The plaintiff lays stress upon the fact that amendment was offered before the judgment was signed. It was impossible for the judge to entertain it unless he had first set aside the judgment on the exception, and ordered a new trial. As it was there was no case before him."

It will be noted that the new fact set up in this supplemental petition for this injunction was filed on March 2, 1899, and the judgment of the court was entered for the State on the same day, and in fact, before the petition was filed, and therefore the injunction, under this supplemental petition, cannot be considered as forming part of the decree that day rendered upon the trial which had been previously concluded before the court. The Article 544 of the Code of Practice provides:

"All judgments, whether interlocutory, final or definitive, must be correctly entered on the record with the date of the day on which the same were entered."

The Article 547 provides:

"Judgments may be amended by the court until after having been signed, in order—

"1. To order the phraseology of the judgment, but not its substance.

"2. To correct errors of calculation, as, for instance, if more has been given than was demanded, or if the party in favor of whom the judgment was given had been ordered to pay the costs.

"Except in the cases above provided, courts cannot alter their judgments, but they may, *ex officio*, direct a new trial in order to review their judgments."

In the case of Miller vs. Chandler, 29 An. p. 91, the court, in the opinion, said:

"After having rendered judgment in open court, and having it entered on the minutes, the judge might, indeed, have corrected a

clerical error, or a mistake in calculation, but to set aside a judgment rejecting the demand of plaintiff, *ex proprio motu*, and to render a judgment, immediately, in favor of plaintiff for a specified sum, with privilege on the property of defendant, thus changing the entire substance and effect of the judgment first rendered and entered, seems to us most extraordinary, and in excess of judicial authority; and we consider this action of the judge so plainly against the letter of the law that we cannot give it the apparent sanction of our silence, nor incur the risk of allowing it to become a precedent."

"The course which the judge pursued in this cause was manifestly in violation of the law as laid down in the Code of Practice; and it shows the importance of requiring the judges to assign, in writing, the reasons for their judgments, with reference to the law on which they are based, when that is practicable."

It will be noted that the injunction issued on March 2, was perpetuated in the final clause of the judgment as formally written and signed on March 8, whilst it was not, and necessarily could not be, a part of the judgment as announced and entered on March 2, which could only be in response to the issues, evidence, etc., on the trial, which had been had and concluded before the court at that time.

Pursuing the proceedings in the District Court in their chronological order, the next step taken by the State was on March 9th, the following day after the final judgment in the case had been formally signed, when on her application she obtained from the Governor of the State, the following appointment and commission to August M. Benedict as liquidator for the company.

"Filed March 9, 1899.

"STATE OF LOUISIANA, EXECUTIVE DEPARTMENT.

"*In the name and by authority of the State of Louisiana*—

"Know ye that by virtue of the authority vested in me by Section 731 of the Revised Statutes, I have nominated, constituted, and appointed, and by these presents do nominate, constitute and appoint, August M. Benedict, liquidator, to take charge of and liquidate the affairs of the New Orleans Debenture Redemption Company of Louisiana, Limited.

"And I do hereby authorize and empower him to execute and fulfil the duties of said office according to law, after qualifying and giving bond in the amount fixed by the Civil District Court for the parish of Orleans.

"In testimony whereof I have hereunto set my hand, at the city of Baton Rouge, this 6th day of March, in the year of our Lord eighteen hundred and ninety-nine.

"(Signed) MURPHY J. FOSTER,
Governor."

"(R. 396).

This appointment was made by the Governor without any rule against the defendant or notice to the defendant to show cause why the appointment should not be made. It was made under the judgment within the delay allowed by law, for the defendant to take an appeal to the Supreme Court and to suspend the judgment by suspensive appeal bond.

On the same day the appointee, August M. Benedict, a third person, theretofore not a party to the suit, intervened after final judgment rendered and sgined by petition of intervention, praying to be recognized as liquidator under his appointment and to be allowed "to take charge of the affairs and assets of the defendant company, and that the officers of the said defendant company be directed to turn over to him all the assets, books, papers, and other property of whatsoever nature or kind belonging to the said defendant corporation." No notice whatever was given to the defendant of this application and no chance was given it to show why his appointment should not be recognized, or why it should not make a surrender of its property and assets to the appointee.

On the same day, without any notice to the defendant company or other person in interest, the court entered the following *ex parte* order, to-wit:

"It is ordered that August M. Benedict be, and he is hereby recognized as liquidator of the New Orleans Debenture Redemption Co. of La., Ltd.; that his commission be spread upon the minutes of this court, and that letters issue to him as such liquidator upon his taking oath and furnishing bond in the sum of ten thousand dollars, to be hereafter increased as the court mad deem necessary.

"It is further ordered that the officers of said defendant company be directed to turn over and transfer to said liquidator all the assets, books and other property of whatever nature or kind belonging to said defendant corporation.

"It is further ordered that an inventory of all the property of said defendant company be taken by George W. Flynn, notary public, of this city, and let E. P. Andre and E. Blanc be appointed and sworn as appraisers to value the property to be inventoried according to law.

"New Orleans, March 9th, 1899.

"(Signed) F. A. MONROE, *Judge*."

It will be noted that this order of the court was rendered *ex parte*, also without any notice to the defendant company or any of its officers, stockholders or other person in interest, upon the *ex parte* application of a third person without interest in the subject matter of the suit, and that the order had for its object the taking of the property from the defendant company and its stockholders, who were the undisputed owners of the property, and that, too, without the suggestion of any legal reason why they should not continue to administer their own property in their own way and to divest them of the control of the property without the suggestion or co-operation of any creditor or other person interested under them.

On the following day, March 10th, "the defendant company," through its counsel, by motion in open court, applied for and was granted a suspensive appeal to the Supreme Court of the State (R. 388, 389), and it filed its bond therefor the same day (R. 402).

On the same day the stockholders of the company intervened, by petition, for the purpose of joining the defendant company in taking a suspensive appeal to the Supreme Court from the judgment signed and from all subsequent proceedings in the case (R. 399 to 401). This was granted them by order of the court (R. 401), and they filed their separate bond therefor the same day (R. 402 to 403).

Thereupon the case was removed under these appeals into the Supreme Court of the State.

The case was heard and argued in the Supreme Court of the State with five other cases of like character, and was finally submitted on May 18th (R. 413). The opinion was delivered June 22nd, through Mr. Justice Breaux as the organ of the court (R. 413 to 423), and resulted in the following decree, viz:

"For the reasons assigned the judgment appealed from is affirmed" (R. 423 and 424).

On the 28th of June the State and August M. Benedict, liquidator, applied for a rehearing on the grounds set forth in their application (R. pp. 426, 427).

On the 29th the defendant company and the individual stockholders, who were the appellants in the case, filed their joint application for a rehearing in their behalf on numerous grounds, which are elaborately set forth in their application (R. pp. 423 to 436).

On the same day, a second opinion was delivered and another judgment was rendered in the case, which are as follows, viz:

"In this case judgment was rendered in the District Court in favor of plaintiff, dated March 2nd, 1899, signed March 6th, 1899.

"From this judgment defendant applied for and obtained a suspensive appeal.

"On appeal, this court affirmed the judgment of the District Court.

"Subsequent to the date of this judgment, on motion of the Attorney General, the District Court recognized the appointment and commission of the Governor of the State of Louisiana issued to August M. Benedict, and ordered that a commission issue to him as liquidator.

"From this order a separate appeal was taken by a number of the shareholders.

"The law and the evidence being in favor of the plaintiff, it is ordered, adjudged and decreed, that the order issued by the court, recognizing August M. Benedict as liquidator, be annulled, avoided and reversed, and the matter left at large.

"It is further ordered, adjudged and decreed, that all the rights of the parties are reserved as relates to the appointment of receiver or liquidator, to be hereafter passed upon, and that this decree is rendered without prejudice in matter of deciding the question presented in case 13,114, New Orleans Debenture Redemption Company vs. Judge" (R. 437).

The Chief Justice, on June 30th, delivered the opinion of the court on the application for a rehearing, and in that opinion the Chief Justice, on the subject of the issue upon which the case was there argued on the trial and decided in the original opinion, said:

"These cases were argued late in the session. The argument was directed to the question of legality, *vel non*, of the charter under which the respective companies carried on business.

"The illegality of the charter was decreed. The court considered that as the liquidator or receiver, *vel non*, contradictorily with parties in interest, the question can be considered in the District Court, to which the judgment is remanded for execution" (R. 439).

Writ of Error.

The appellants in the State Court, who are the "plaintiffs in error" here, applied for and obtained the writ of error under which the cause was removed into this court.

In the assignment of errors, the grounds are set up in a number of paragraphs, to present the different phases of the errors complained of. For all practical reasons, however, the assignment of errors may be considered in this argument under the following propositions:

That the proceedings instituted in the District Court on May 20, 1898, to declare the nullity of the company's charter, and the consequent non-existence of the company as a corporate entity, were invalid and not due process of law; that the judgment of the District Court declaring the nullity of the charter on grounds establishing the non-existence of the association as a corporation, and the decree of the Supreme Court rendered on the appeal affirming that judgment of the District Court, were so rendered

without due process of law and that the effect of the decree of the Supreme Court of the State is to deprive the association and its associates of their legal rights, privileges and immunities of pursuing a lawful business or enterprise, and to deprive them, without due process of law, of their legal right to possess and control in their own way the common property and effects of the association belonging to them in violation of the Fourteenth Amendment of the Constitution of the United States, for the following reasons, to-wit:

First—Because there was no party plaintiff in the action competent to bring the suit or stand in judgment in relation to the causes alleged, and the State was not properly or rightfully a party plaintiff, and the institution of the suit in her name was without authority of law.

Second.—Because no defendant was notified or cited to appear to defend the suit. The only notice or citation issued or served was directed to and served upon the "New Orleans Debenture Redemption Company of Louisiana, Limited," the defendant association, claiming to be a corporation which could not properly or legally be joined or made a party to the suit, which had for its object a decree to establish the nullity of its charter and consequently its own non-existence.

Third.—Because the second writ of injunction of March 2, 1899, was ordered and issued by the District Court upon a second supplemental petition, in the name of the State, filed after the final hearing of the case and after its final submission for decision. Because the writ was issued upon grounds set forth in said second supplemental petition after final trial of the case, without notice to or served upon any one and because after final judgment had been rendered in favor of the State on March 2, 1899, a clause was inserted in the formal judgment signed on March 8, 1899, perpetuating the writ without notice to or trial had with any one upon the issues raised in the said petition upon which it issued.

Fourth—Because the said judgment of the Supreme Court affirming the proceedings and judgment of the said District Court

operates to deprive these plaintiffs in error of their rights, privileges and immunities as persons and citizens of the State in the pursuit of a lawful business in their corporate capacity as provided for in their charter.

As originally instituted in the District Court on May 20, 1898, the principal object of the action was to have the charter of the company judicially declared to be without authority of law and null and void *ab initio*, and incidentally to enjoin the company, its officers, agents and representatives, from continuing to act as a corporation or pursuing business under its pretended charter, and, furthermore, to enjoin the company from declaring forfeited or lapsed any rights of its debenture holders for their failure to pay installments maturing during the pendency of the action.

As originally filed, the suit included the alternative object or purpose in case the charter should not be declared null and void, that it should be in that event decreed forfeited upon the grounds set forth.

In as much as the alternative event, upon which the relief for forfeiture was demanded, never happened, the demand for forfeiture of the charter dropped out of the case when the final judgment of the District Court was rendered on March 2, 1899, declaring the charter null and void as primarily prayed for.

The appeal was taken by the defendant company (R. 398) and by the individual stockholders (R. 399-401) to annul and reverse the judgment of the District Court decreeing the nullity of the charter of the defendant company and the subsequent proceedings in the District Court. There was no judgment of forfeiture rendered in the District Court, and hence the issues originally involved in the suit were not carried up by the appeals taken, and these issues in relation to forfeiture were not involved on their appeal under which the case was taken up. The State did not join in the appeal in the Supreme Court or pray in that court for an amendement of the judgment of the lower court to decree the forfeiture of the defendant's charter in case the judgment of the Dstrict Court decreeing the nullity of the charter should be re-

versed on the appeal so as to include the issue over the forfeiture of the charter before the Supreme Court on the appeal. The only issue, therefore, upon which the case was carried by appeal to the Supreme Court was that in relation to the nullity of the charter.

In order to bring up the issue in relation to the forfeiture of the charter it was necessary that the State, as appellee, should pray, under C. P. 889, for an amendment of the judgment of the lower court in her favor in relation to the forfeiture originally demanded. This rule is the settled jurisprudence of the State under the following authorities, to-wit:

> "Where appellee files no answer to the appeal and makes no motion to amend the judgment in his favor, the appeal brings up the case only on the complaint of the appellant, and the court can only pass on that complaint." Succession of Ostrander, 26 La. An. 451. See Talle vs. Monasterio, 48 La. An. 1234; Gathe vs. Broussard, 49 La. An. 317, to the same effect.

The writ of error brings up the case for review here upon the issues upon which it was heard in the State Supreme Court, and this confines the object and purpose of the suit to the original demand for the nullity of the charter to which we limit the discussion of the case here.

As we have seen the injunction originally issued on May 20th, 1898, was dissolved and set aside May 26th (R. 6), and it thereafter ceased to be an object of the suit.

The consideration of the right to bring this suit in the name of the State must now be limited to the single object or purpose to annul the charter; the original issues in relation to the State's right to forfeit the charter having been finally disposed of before the case reached the State Supreme Court, to which the writ of error in this case was directed.

First.

The State is not rightfully or properly a plaintiff in this suit, and the institution of the suit in her name is without authority of law and is itself null and void, and not due process of law.

The position of counsel for plaintiffs in error is that the State's name cannot be used as a plaintiff to bring a civil action where only the private or individual rights of persons are involved.

In the State, the fundamental principle prevails of a government by fixed laws, rules and regulations, under which the energies of the government are exerted for the enforcement of individual rights and the redress of civil wrongs, in the manner and under the rules and regulations provided for that purpose. It is not the intention of our form of government that the personal rights of citizens should be enforced or their civil wrongs redressed by civil action in the name of the State by her direct intervention, but individual interests are to be asserted and enforced in the name and at the instance and suit of the persons in interest by the proceedings provided by the State's laws for that purpose.

When the State is brought into Court in a civil proceeding, she is governed by the same laws, rules and regulations which apply to other litigants. She certainly cannot complain when held to observe the rules and regulations which she has enacted for the control of all others.

The Code of Practice, Article 15, provides:

> "An action can only be brought by one having a real and actual interest which he pursues, but as soon as that interest arises he may bring his action."

The theory, upon which the right to use the State as plaintiff in this case, appears to be rested on the idea that the association or company is in possession of and exercising some "franchise" of the State or some public or special privilege or immunity which does not belong to the citizens of a country generally of common right. The objection of the plaintiffs in error to the use of the State's name is predicated upon the view that no such "franchise" of the State is involved in the object or purposes of the suit, and that the suit did not involve any public or special privilege or immunity which does not belong to the citizens of the State generally and of common right; that the suit, as instituted, did not involve any public right, privilege or prerogative whatever, within

the State's right of separate control, and that she is without any real or actual interest in any of the objects or purposes which the suit was instituted to accomplish.

Looking to the law under which the company was organized, and the objects and purposes for which the organization was effected, we fail to find that the defendant company acquired, by its organization, any public "franchise" belonging to the State, or any public or special privilege or immunity which does not belong to the citizens of the State generally or of common right; nor do we find in the object or purposes of its organization anything over which the State has the right of separate control, or other matter in which the State has a direct interest either pecuniary or prerogative.

The company was organized under Act No. 36 of 1888 of the State, in the city of New Orleans, on September 25, 1894, by some twenty persons, corporators, who met and adopted its charter by an act passed before Henry L. Garland, notary public (R. 226-230).

The organization was effected for the purpose of carrying on the debenture business, which it afterward pursued at its office in the city of New Orleans from October 1, 1894, without disturbance until this suit was filed against it on May 20, 1898.

The Act No. 36 of 1888, under which it was organized, provides:

> "Sec. 1. That it shall be lawful for any number of persons, not less than three, upon complying with the provisions of the laws of this State governing corporations in general, to form themselves into and constitute a corporation for the purpose of carrying on any lawful business or enterprise, not otherwise specially provided for, and not inconsistent with the Constitution and laws of this State," "provided no such corporation shall engage in stock jobbing of any kind."
>
> "Sec. 3. That no stockholder of such corporation shall ever be held liable or responsible for the contracts or faults of such corporations in any further sum than the unpaid balance due to the company on the shares owned by him."

We will search this Act in vain to find in this association, organized under it, any "franchise" belonging to the State or any special privilege or immunity conferred upon it, which does not belong to the citizens of the State generally or of common right. The authority to organize and constitute the so-called corporation is not conferred by the Act upon the corporate body itself, but is expressly conferred upon and limited to the individual incorporators; the right under the Act to constitute the corporation is a privilege confined to the corporators organizing it.

There is a plain distinction between the authority or privilege "to organize a corporation," and the "objects and purposes" of a corporation, or what is to be done or acquired by the corporate body after its organization. Andrews Bros. vs. Youngstown Coke Co., 86 Fed. 590, and authorities there cited.

> "The essential properties of corporate existence are quite distinct from the franchise of the corporation."
>
> "The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and exercised by the corporate body as such are franchises of the corporation." Memphis R. R. Co. vs. Commissioners, 112 U. S. 619.

The "objects and purposes" of corporations constituted under this Act and the "powers and privileges vested in them," to be exercised by them under the Act, is expressly limited by the Act to "the purpose of carrying on any lawful business or enterprise."

It will not be contended, we presume, that the right to carry on any lawful business or enterprise" is a "franchise" belonging to the State, or one which she has the right to confer upon or withhold from individuals or corporations. The sole "powers and privileges" which are conferred upon the corporation under the Act, organized under it, is the right of carrying on any lawful business or enterprise."

And this right to pursue a lawful business was not a prerogative of the State, nor one which she could grant to persons or take away from them. Such is an inherent right reserved to the

people themselves. Such a right the State can neither give nor take away.

Speaking on this subject the court, in the case of Allgeyer vs. Louisiana, 165 U S. 589, 590, said:

> "The liberty mentioned in the amendment (14th) means not only the right of a citizen to be free from the mere physical restraint of his person, by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential, to his carrying out to a successful conclusion the purposes above mentioned.
>
> "This right is a large ingredient in the civil liberty of the citizen—the liberty of pursuit—the right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States."

We do not wish to be understood as dissenting from the doctrine of the plenary power of the State over the subject matter of creating or authorizing such corporations, and we concede that her power to grant or withhold charters, as well as to grant or withhold authority to others, to constitute such corporations is unlimited. What we here insist is, that where the State has acted through her Legislature and authorized the organization of the corporation, and such corporation has been constituted under her authority that, in common with other persons, it cannot, after its creation, be denied the common right to pursue any lawful business or enterprise not inconsistent with the objects and purposes of its creation; and that is precisely what the State is attempting by this suit to do in relation to the company, plaintiff in error, in this cause.

It will, therefore, be seen that the privileges and benefits conferred by the first section of the Act No. 36 of 1888 are to the corporators in permitting them to constitute a corporation for such purposes, and it is not a privilege or a benefit conferred upon the corporation itself, to be exercised by it, after its creation.

It certainly cannot be said that the company enjoys any special privilege in its right "to carry on any lawful business or enterprise" which does not equally belong to all persons, who have the equal right to carry on the same business or enterprise, for such is not a right peculiar either to corporations or to individuals.

The Legislature, indeed, did not possess the power to confer any such "special privilege" or "franchise" on private corporations.

Suffice it to say that the Legislature did not confer the right of business pursuit upon corporations organized under the Act to the exclusion of the right of all other persons equally to engage in the same pursuit, and it does not confer upon corporations organized under it any right "which does not belong to the citizens generally or of common right."

Is it true that the power existed in the Legislature to withhold authority to organize corporations for the pursuit of private business enterprises.

But when the Legislature, by the Act of 1898, authorized the organization of corporations for the pursuit of all private business enterprises, it became a common right in all citizens to unite and form such corporations for the purpose authorized, and, when they did so, it is not seen where the power exists to take away the right thus exercised and established under direct authority of the Legislature itself.

The right of the incorporators in this case to "associate" and carry on any lawful business or enterprise is not derived from the Act of 1888; that right they had before the Act was passed, for they had the right to unite and combine their energies and capital to carry on any lawful business or enterprise without the aid of the Act.

But, of course, they could not do so without incurring the resulting liability flowing from their transactions.

The Act, however, does confer upon the corporators the right and power to do this in the form provided, under the limited liability in the Act, for it provides:

"That no stockholder of such corporations shall be held liable or responsible for the contracts or faults of such corporations in any further sum than the unpaid balance due to the company on the shares owned by him." But this limited liability is in favor of the stockholders or incorporators, not in favor of the corporation itself, for there is no limit fixed for the liability of the corporation, it is only in favor of the stockholders.

Reduced to the last significance, the Act is only an exemption from personal liability of the stockholders for the transaction of the business, but this limit to liability of parties engaged in business transactions can only concern the persons so engaged in the business who have the right, by their covenants and contracts, to fix other limits to their liability in their business pursuits, and they always have under their own control liabilities of those engaged in business with them. Such liability in business transactions only relate to and concern the parties to the tranactions.

If the company, indeed, be not a corporation, then the liability of the incorporators and stockholders is not limited under the Act, and creditors holding the company's obligations have adequate remedy at their own suit to enforce all liabilities arising against the stockholders. Williams vs. Howitt, 47 An. 1076, and authorities cited.

Taking this view of the case, as presented by the State's petition in the District Court, we are unable to say what rights, interests or prerogatives, are involved, which rise to the dignity of public matters or above those ordinary transactions between citizens in their everyday life.

Whence comes the right of the State if only personal, private and individual matters are involved in the business pursued by the company to bring the suit in her own name to settle such personal matters? If she can sue in such a case, why cannot she likewise sue in every case where a citizen holds a promissory note past due against another citizen? The recognition of such a doctrine and the establishment of such a practice would be subversive

of all our notions of the proper functions of our governmental agencies.

Again, if we should concede that the incorporators in this case organized this company for the pursuit of a business or enterprise, as charged by the State, for purposes and objects which are vicious, illegal, immoral and *contra bonos mores*, they would still be transactions of a private character between citizens, and we do not understand the rule of law ever to have been applied to such illegal transactions, not amounting to actual crimes, which would justify the State in going into court to inquire into them.

The rule of law, as we understand it on this subject, is of universal application and just the reverse of such a practice. As we understand it, the law cannot lend its aid to enforce reprobated contracts or to settle disputes between parties in relation to them; in all such cases the State leaves the parties in the position in which their reprobated contracts place them, giving to neither party the right of redress under such contract, nor for the enforcement of any rights personal to them. The familiar rule *ex turpi causa non oritur actio* has been uniformly applied to such cases, and we have not yet found any case where the State has intervened under such a contract between the parties either to declare its illegality or to enforce or set aside the contracts which are so reprobated.

The penalty of the law is inflicted by withdrawing the government's protection and authority from the persons so engaged. We know of no case in which the rule has been differently applied to private corporations of the class to which the one under consideration in this case belongs. Such corporations are substituted for persons, and when so substituted for the pursuit of a purely private business it is not seen how the effect of the laws can be different as to contracts made by such artificial persons from those in relation to individual or natural persons pursuing like avocations. Both are persons equally before the law, and if the State may not, in the one case of an individual, intervene in the business for the purpose of establishing his resulting obligations

from the business transacted, it is not seen how she can do so in the other case of a private corporation like engaged, and which cannot be differentiated in any legal sense.

Hence, whether the charter of the Debenture Company in this case, enacted by its incorporators, be legal or illegal, it occurs to us cannot effect the right of the State to bring the suit or stand in judgment upon it any more than in any other like contract between other private citizens. If we are correct that the same rule applies to those private corporations that control contracts made by individuals, it seems clear that if the charter be regarded as an illegal act, the State can refuse all relief to parties engaged in or connected with the reprobated acts and contracts. She will neither, herself, sue in the matter or entertain in her courts such a suit over the subject matter between the parties so engaged themselves, but she will leave them without remedy where their reprobated conduct places them to suffer the consequences of their own illegal acts.

The right of the State to plead or establish the illegality of the charter on the grounds alleged in this case appears, from the petition, to be based on the notion that the business and the transactions had by the company, under the charter, will injuriously effect the pecuniary rights and interests of those persons who invest in the purchase of its debentures. We cannot see what interest or right the State has to establish, if she can, the nullity of the charter on the ground that the business pursued under it is illegal and *contra bonos mores*, when, as we have seen, the sole legal effect of a judgment decreeing the nullity on such ground would be to deny the stockholders and members of the company the limited liability established under the Act of 1888. Such a limitation of their liability can only concern creditors holding obligations against the company or its members. As we have seen, if the business, indeed, be illegal and *contra bonos mores*, as alleged by the State, then the debenture holders, in whose interest the State claims to act, are themselves parties to the illegal transaction, and under the rule cited they would not be permitted to sue in their

own interest to establish any rights in themselves from such illegal transactions. It, therefore, seems clear that the State is without interest and without right in law, in her own name, to sue to establish the nullity of the charter on such grounds.

But it seems no less clear that if we admit that the debenture holders have the right, in their own interest, to sue to enforce the obligations of the company or its members in their favor, that such a right is one personal to them to be exercised only by them in their own interest. Such a right of action can no more be exercised by the State than one upon a promissory note due from one citizen to another of the State.

An elaborate opinion on this subject was delivered in the Supreme Court of New York, by the Chief Justice Earle, in the case of the People vs. Lowe, 117 N. Y. 175-190. The court there entered into a review of the authorities on the subject of the State's interest in and right to control such matters by a civil action in her own name, and, on page 190, said:

> "The people of the State, like all other parties to actions, must show an interest in the subject matter of the litigation to entitle them to prosecute a suit and demand relief."
>
> "The people of this State have no general power to invoke the action of the courts of justice by suits in their name of sovereignty for the redress of civil wrongs sustained by some citizens at the hands of others. When they come into court, as plaintiffs in a civil action, they must come upon their own right for relief to which they are themselves entitled. It is not sufficient for the people to show that wrong has been done to some one. The wrong must appear to be done to the people in order to support an action by the people for its redress."
>
> The Attorney General, in an action brought by him, represents the whole people and a public interest, and not merely individuals and private rights."

On page 193 the court, after a review of the authorities on the subject, further said:

> "Suits like this are a new invention. We believe they were unknown to the generation of statesmen, judges and

lawyers, living at the time of the adoption of the Revised Statutes, and for more than fifty years after that time no trace of such an action can be found in the reports of this State."

On page 195 the court added:

"Neither public nor private interests require the maintenance of such a suit as this. The private parties who feel aggrieved in such cases have ample remedies to redress their wrongs by proceedings in their own names; and why should not the complaining members of this corporation redress them in that way at their own expense and risk?"

Again it is claimed that the State has a right to sue in all cases where parties are claiming to act under a charter in a corporate capacity. Such was the English rule when all corporations included the exercise of franchises vested in the King's person which belonged to the crown and which the King, under his prerogative rights and powers, could vest in the corporate body and retake at his pleasure.

The right of the sovereign to sue by *quo warranto*, or information to recover the "franchise," was predicated upon the sovereign ownership of the "franchise" of the corporation and which was administered by the corporation under the authority of the sovereign having the right of control over it. This ownership, of course, included the interest, and hence the right to sue in the sovereign granting the franchise, and the suit by the sovereign to recover the franchise was predicated upon a real and actual interest in the sovereign, implied by the ownership of the thing sued for. But as we have seen the right and interest of the sovereign to the franchise sued for, on which those adjudications are predicated, are not found to exist in the case at hand.

It is true the English rule on this subject was early adopted in the jurisprudence of most of the States, and the rule has since been changed and modified by the Statutes of most of the States to adopt the rule to the State's requirements. But this jurisprudence, as well as such enactments, are all intended to apply to corporations exercising or administering "franchises" which were

the subject of governmental control and ownership, and which formed the subject matter of the suit by the sovereign in the proceedings by *quo warranto* or information.

The tendency of late years of some of the States to the policy of extending the scope of corporate influence and action to cover the entire field of human industry (as in this State with the single exception of stock jobbing), and to include all private business pursuits, has extended the sphere of corporate action to cover all private pursuits in common with all other persons and citizens. And in this way corporate action has been authorized to engage in private pursuits and individual enterprises which have heretofore been ranked among the reserved rights, privileges and immunities in favor of the whole people of the State and over which the State, under her constitutional limitations and fundamental restrictions, can lay no claim either to own or specially control; and these are quite dissimilar and distinct from those "franchises" controlled by the crown under the English rule in those cases where the crown was admitted to sue for their recovery into the hands of the King. They are also quite distinct from those public or *quasi* public franchises let to corporate administration by the States in cases where the State has been admitted to sue for their recovery. But in all the cases under that rule the right of the sovereign to sue and reclaim the possession or control of the franchises, or recover them from the corporate administration, was predicated upon the sovereign ownership of the franchise or the special right to control its administration. This rule, however, will not apply to corporations such as the one sued in this case, and which are engaged in those private pursuits and private industries included in the reserved rights common to all the people and the control of which is denied to the State by those constitutional limitations and restrictions in favor of the liberty of the citizen; because the State, in this class of cases, is without the ownership or right to control the private business pursued by those corporations authorized by law and organized for that purpose. The State's right to sue must be limited under the old rule to those cases where the

State has the ownership or right to control the business conducted or "franchise" pursued or administered by the corporation, and where the State has the right and interest to inquire into the business transacted.

Admiting the right of the State to sue where the only franchise of the corporation is the right to pursue the ordinary private business or avocations common to society, would be to allow the State to grow out of the sphere of her constitutional limitations, and to allow her to acquire a surveilance over the pursuit of those private business avocations the control of which she has heretofore been debarred from exercising.

Second.

The defendant company, in its corporate capacity under the law of Louisiana, could not be made the defendant in the suit having for its object a decree declaring its own non-existence as a juridical person.

It would be a competent defendant to declare the forfeiture of its charter, but in the nature of things it cannot defend the suit the object of which is a denial of its own existence. The company, in its corporate capacity and in its corporate name, alone was sued and the judgment rendered by the District Court, which was affirmed on the appeal in the Supreme Court, declares: "The pretended charter under which said defendant claims corporate existence to be null, void, and of no effect, and that "the general manager and the officers, agents, directors, stockholders and members of said so-called corporation are and have been without legal authority to act in a corporate capacity in the name of said New Orleans Debenture Redemption Company of Louisiana, Limited, and under color of its pretended charter."

The State brought the suit against the company in its corporate name and capacity; alleged in effect that it was not an incorporated body and hence that it was one that could neither sue nor be sued, and that it was one without capacity in law to appear in

court to defend the suit or for any other purpose. Hence the company is not and cannot be the proper defendant in such an action.

On this subject the Louisiana Civil Code, Article 446, pointedly says:

> "Corporations unauthorized by law or by an Act of the Legislature, enjoy no public character, and cannot appear in a court of justice, but in the individual name of all the members who compose it, and not as a political body; although these corporations may acquire and possess estates, and have common interests as well as other private societies."

The courts of the State have heretofore uniformly, in the enforcement of this article, refused to recognize in this class of cases associations which are not authorized by law or established according to law as corporate bodies.

In the case of Soller vs. Mouton, 3rd An. p. 542, the Supreme Court, applying the two Articles 432 and 446 of the Civil Code, said:

> "The contract was with an association. If the association was an unincorporated one, the suit should have been brought in the name of all individuals composing it; if incorporated, in the corporate name."

In the case of Workingman's Accommodation Bank vs. Converse, 29 An. 371-2, the Supreme Court of the State said on this subject:

> "When the Legislature has declared that corporations unauthorized by law cannot appear in a court of justice in their corporate name, we understand that courts must say to them when they do so appear that they cannot be heard. A sound ethics will not be abraded when the parties who thus shelter themselves behind this prohibition can be pursued by the individuals who compose the corporation when suing in their name. And that is what the Code permits—not only permits, but prescribes—that courts shall not hear their demands when appearing in any other capacity."

Again, in the case of Congregation, etc., vs. Farrelly, 34 An. p. 534, the Court said:

"The petition was originally filed in the name of the Congregation, as if it were a corporation. Exception was filed that, not being incorporated, the congregation could not sue in that form. The exception was undoubtedly good." (Authorities.)

The Court further said on this subject, in the case of Commissioners vs. Converse, 37 An. p. 488:

"The learned counsel for defendants advances the startling proposition that there exists two kinds of corporations under the law of Louisiana, viz: corporations *authorized by law* and corporations *unauthorized by law;* arguing therefrom that the Workingman's Accommodation Bank, though decided not to be a legal corporation, was nevertheless a corporation of some other kind (an *illegal* one, we suppose), and as such, can alone stand in judgment against its clients. With due respect, the proposition has not the slightest foundation. It is utterly inconsistent with the definition of the nature and qualities of a corporation as given in Articles 427, 432, 433, 436, 437, etc., of the Code, among which we will mention that it is an intellectual being considered for some purposes as a natural person; that it must be authorized by the Legislature or established according to law; that it must have a name, and in that name *must* sue and be sued, and do all legal acts; that its members can neither sue nor be sued, etc. These are essential qualities of a corporation, without which it cannot exist."

In the case of Williams vs. Hewett, 47 An. 1081, the defendants claiming to be a banking corporation, but who had not complied with statutory requirements, and whose charter was therefore not authorized by law, were sued individually by the plaintiff, a depositor, as a commercial partnership and as liable *in solido* for the debts of the association, and they were there so held by the Court as not being a corporation, and the suit against the individuals was maintained.

It may be therefore considered as settled in Louisiana by statute, supported by its jurisprudence, that an association claiming to be a corporation which is not organized according to law or which is not authorized by law cannot appear in court—cannot

sue or be sued—except in the name of all the members composing it.

In this case the anomalous condition is presented of a suit in court against a defendant, which the plaintiff in the suit alleges in effect, is not *in esse,* and which the court, in the judgment rendered, judicially declares does not exist. We scarcely know how to contemplate judicial proceedings under such anomalous conditions. If there indeed be no defendant in the case we cannot understand how an issue could be formed or joined to act as the basis for a judgment to be rendered. The judgment rendered in the District Court, which was affirmed in the Supreme Court of the State is against the "New Orleans Debenture Redemption Company of Louisiana, Limited," which is an association in that name claiming to be a corporation—a juridical person—and in which capacity alone it can exist or appear in court or elsewhere, and yet in the body of the judgment itself it is judicially, finally and solemnly decreed that no such corporation or judicial person exists.

According to the terms of the judgment, there is no defendant in the case, and the judgment therefore exists against no one. The judgment itself is self-destructive; rendered against no one, and the proceedings upon which it rests are without legal effect, for there cannot be contradictory judicial proceedings without the parties necessary to form them contradictorily with each other.

This is not the only objection. Even if we view the company as a corporation, a juridicalperson, still it was not a party to the charter, which is the act sought to be annulled by the suit. The charter is the act, exclusively of the incorporators by whom it was adopted, and none of whom were cited or notified to defend the suit or made parties to it.

The general rule is that in all suits to annul contracts and acts for fraud or illegality, all the parties to the act sought to be annulled, or having an interest against its annullment, should be made parties to the suit to have the nullity declared. The courts of Louisiana have heretofore uniformly declined to declare such

acts and contracts null or void without having the parties to them or interested under them before the court to defend the action.

In the case of Burney vs. Ludeling, 41 An. 637, where simulated sales and contracts were assailed and all the parties to them or interested under them were not cited or joined as defendants, the court, quoting from Block vs. Bordelon, 38 An. 696, said:

> "That all parties in interest should be joined in a suit and made parties thereto, when that interest was directly involved, would seem axiomatic. Especially would we be impressed with the truth of this proposition in a case where it was charged that a contract to which there were two or more parties, was null because they were guilty of fraud in making it. It would seem highly unjust, if not impossible, to investigate and determine the fraud charged, and even to annul the contract—the subject of it—when only one of the alleged wrong-doers was before the court, and the other not heard at all, and no opportunity given him to be heard. So far from this seeming requirement being observed in the case before us, we find that those who are not charged as participants in the fraud complained of, and in no light to be viewed other than mere innocent beneficiaries of the same, are alone sued, whilse the one who is accused of planning and consummating the fraud, and who inaugurated and conducted the proceeding by which the purpose was accomplished, is left entirely out of the case, neither sued nor cited." 41 An. p. 637.

The court there further said:

> "In view of these authorities we think the various parties to the sales and contracts enumerated should be cited and made party defendants, because, in their absence, no decree could be rendered affecting them."

In Block vs. Bordelon, 38 An. 699, upon the subject of the necessity for making all parties in interest parties to the suit, the court *arguendo* further said:

> "How can it be determined whether, for instance, in a contract of sale, it was made in fraud of creditors or in good faith, and whether in good or bad faith, that it was not injurious to creditors, when the vendor was not before the court? Could such vendor with any color of justice be condemned in these important respects without a hearing? It seems that

such a course would not only be violative of a fundamental right, but would necessarily oftentimes work the grossest injustice."

Whilst the principles above were applied to those cases involving the revocation of sales and contracts for fraud and simulation, the same principles there announced, apply with no less pertinency to this suit, wherein the State sues to have the charter of this company annulled on grounds of fraud and illegality, contradictorily with the asociated body, the innocent non-participating beneficiary alone as the defendant, whilst those whom it accuses of planning and adopting the charter for the accomplishment of the obnoxious purposes alleged in the petition, and who constituted the corporation, are left entirely out of the case, neither sued nor cited.

In no event could the corporation be a party to the act—the charter—by which it was constituted, and whilst the act is the thing sought to be annulled by the suit, the constituted body alone is cited to answer, but none of the persons by whom the charter was adopted are cited, notified or made parties. The party cited or notified to defend was not and could not be a defendant in the action; and those who were the real defendants interested, and the only parties whose liability could be affected by the judgment, were not cited or notified. The suit, therefore, as it was instituted, prosecuted and decided in the District Court of the State was one in which there was no defendant cited or notified, competent to sue or be sued or to appear in a court of justice for any purpose.

The position was assumed in the written opinion of the District Court filed (R. p. 15), that the defendant company is estopped in this suit from denying its corporate existence, and the attempt was there made to apply in this case the estoppel applied by the Supreme Court in the Linigan case, 46 An. 1125.

There is no similarity between the two cases. In the case at bar, the State, in her petition, judicially asserts the non-existence of the corporate body of the defendant, by alleging the nullity of its charter and by alleging in effect that it is not a corporation.

The State is thereby estopped from asserting for any purpose of this suit that the defendant company is a corporation. It was the duty of the State to bring into court proper and competent defendants to defend the action, under her theory and allegations that the defendant company was not a corporation or a juridical person which could be brought into court for any purpose, and the court was first bound to hold her to this position to vindicate and maintain the sanctity of its own proceedings.

Denton vs. Irwin, 5 An. p. 21-2:

"The law holds parties to their allegations of record. It does not allow them to play fast and loose, to falsify what they have solemnly declared to be a fact—the truth. They are not subject to explanation or contradiction *ab extra* as a rule; so that what appears to be of record is to be proved thereby only, and nothing conflicting therewith can be admitted." (Authorities.) Gaudet vs. Gauthreau, 40 An. p. 189.

"The State having authorized a mortgage is estopped from impeaching it." Mower vs. Kent, 42 An. 1016.

"It is well established that one is bound by judicial allegations to such an extent that he will not be heard to contradict them." Walker vs. Walker, 37 An. 108, and authorities there cited.

"The rule as to judicial allegations is founded on the obligation to speak the truth in judicial averments and binds whenever contradictory or inconsistent matters are sought to be established by the party making them. This rule is not to be confounded with the estoppel by *res adjudicata* which rests upon, not the facts alleged by one or more of the parties, but on the matter established by the decree. The State as a litigant in court is bound by the same estoppel as other persons, and is entitled to no greater right or immunity as a litigant than they are. The doctrine of estoppel applies to the State just as it does to individuals." State of Louisiana vs. Taylor, 28 An. 460 and 462. Reaffirmed in State vs. Ober, 34 An. 361, where the court in the rule as laid down in the Taylor case adds:

"Nor is this rule of law varied by the fact that there are others interested in the subject-matter of the proceedings conducted by the State."

In Folger vs. Palmer, 35 An. 744, again say on this subject:

> "Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine, which firmly binds the party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made." (Authorities.)
>
> "The doctrine is so firmly sanctioned both by reason and justice that our courts have unhesitatingly extended its operation to the State itself."

It is clear from these authorities that the estoppel operates in law against the State's claiming in this suit, that the defendant company is a corporation, in contravention of her judicial allegation, that it is not such a corporation.

The learned District Judge, in the written opinion filed, attempts to apply the estoppel to the individual incorporators who adopted the charter of the company, and he says (R. p. 15) that they—

> "are claiming to be incorporated under that name and so holding themselves out to the world, and that the purpose of the exception is to maintain their right to act in a corarate capacity,"

but these individual corporators were not parties to the suit nor before the court, either in their individual names or according to the theory of the State in the name of an existing corporation. Again, the court further says:

> "Beyond this, by the notarial acts which they claim to be their charter and amended charter, they have specificially provided that they (?) may be brought into court for any purpose with that for which they are associated, by citation upon one of their number whom they designated as their president."

We will search the charter and amended charter in vain to find any authority to bring these individual incorporators into court personally by a citation addressed to the corporation by its name or served upon its president. They provided that the *corporation itself* might be so brought into court, but they did

not provide that they, themselves, might be so brought into court individually. They could only be brought into court under C. C. 446 by a citation addressed to them individually and served upon them or upon their agent specially authorized by them to receive the citation individually for them.

The officers and agents empowered by the charter to speak and act for the corporate body, considered as a juridical person, are not thereby *ex officio* the agents or representatives of the individual corporators or stockholders; "their act is supposed to be the act of the corporation" (C. C. 439). As we have seen, the citation, (R. 5) issued in the case was expressly directed to the *association in its corporate name* and as a corporate body, and summoned *it* to deliver *its* answer to the clerk of the court. It was in no sense a citation or summon to the individuals composing the association, and they were not made parties to the suit or notified to appear or defend the action.

It is a well settled rule of jurisprudence well recognized and uniformly enforced in Louisiana, that—"A judgment rendered against a party, who has neither been cited nor appeared, is an absolute nullity, which may be invoked by any one interested." 1 N. S. 9; 8 N. S. 145; 6 L. 577; 16 L. 570; 17 L. 42, 448; 2 A. 403; 13 A. 150; 1 M. 220.

> "To condemn without first hearing a defendant, or giving him an opportunity to be heard, is contrary to all principles of equity and law. Therefore, a judgment rendered against a person without citing him in the ordinary manner, without his appearing, or anything deemed equivalent to citation or appearance, is utterly void, and imports such absolute nullity, that any one the least interested in opposing its effects may have such nullity pronounced. See also 6 L. R. 577, and 9 An. 496." Fletcher vs. Henley, 13 An. 150. See also Walworth vs. Stevenson, 24 An. p. 253.
>
> "It is settled by the amplest authority that a judgment rendered against a party who has not been cited and who has not appeared, is an absolute nullity, which can be invoked, not only by such party, but also by any one interested." Bledsoe vs. Irwin, 33 An. p. 618.

"A court can presume nothing with respect to a party being cited; nothing will cure defect of citation or want of service, except appearing and answering to the merits. 5 N. S. 429; 7 N. S. 161; 1 R. 30; 13 A. 347."

"There is no allegation in the petition, nor evidence in the record, that Stadteker was the agent of the defendant, authorized to receive for him service of petition and citation. The return of the sheriff cannot be considered evidence of such an agency. Fortier vs. Field, 17 La. 587. The case, therefore, stands before us as that of a judgment rendered without service of petition and citation. This is required by the Code of Practice; its omission is not cured by the service of the writ of arrest. This point has been so repeatedly held, that it cannot now be disputed. See Wall. vs. Wilson, 4 La. 171; Slocomb vs. Boswell, 13 La. 10; Zacharie vs. Blondin, 4 La. 156. The appearance of the defendant by counsel, in a motion to set aside the arrest, cannot be deemed a waiver of service of citation and a copy of the petition, nor as authorizing the presumption of an acknowledgment of such service." Jacobs vs. Sartorius, 3 An. 9.

The doctrine of this case was reaffirmed in the case of Collier vs. Morgan's R. R. & Stm. Co., 41 An. p. 39.

The individual corporators are not bound by the citation in this case which was directed to the corporate body in its corporate name alone; no citation having been issued to or served upon them either to appear individually or through an agent. In the case of Belard vs. Gebelin, 47 An. p. 166, the court said on this subject:

"The defendants cannot be considered bound by a citation not addressed to them or to their curator *ad hoc* as their legal representative in the suit."

But in the case at bar the individual corporators were neither made parties to the suit nor cited to appear or defend; they made no appearance in the court of original jurisdiction and in no way became parties to the suit.

They joined in an appeal to the Supreme Court to annul and set aside the judgment rendered by the District Court on the ground, among others, that they were necessary parties to the suit

and should have been joined and made defendants in the District Court prior to the judgment rendered.

We have gone thus far into a review of the proceedings had in this case and the discussion of the parties to the action and a review of the jurisprudence of the State applicable to such causes, with the view to show that the proceedings had in the State court are not due process of law; but that they are contrary to those usages and precedents established as the law of the land; that they are a departure from the general rules which govern society and not such as the maxims of the law permit and sanction.

In the amended answer filed by the defendant in the District Court (R. 32) it is specially set up and alleged that this suit, as instituted and prosecuted, is for a purpose, and has for its object one which is in violation of the Constitution and laws of the United States, in that it is intended to deprive the defendant of its property without due process of law, and denies to it the equal protection of the laws of the State; that it is in contravention not only of the State, but of the Constitution and amendments thereto of the United States, in that said object and purpose is intended to deprive it of its lawful right to pursue a lawful business, calling or avocation, and is an unlawful discrimination against it and a denial to it of the equal protection of the law.

Due Process of Law.

The phrase "due process of law" antedates the establishment of our institutions, and is endeared to our race by antiquity and the noblest historical associations. It embodies one of the broadest and most far-reaching guarantees of personal and property rights.

In Bank of Columbia vs. Oakley, 4 Wheat. 244, Mr. Justice Johnson, speaking for the Court, said:

> "As to the words from Magna Charta, incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the pow-

ers of government, unrestrained by the established principles of private rights and distributive justice."

And Judge Cooley, Const. Lim., 355, said:

"While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land."

As said by Mr. Justice Matthews, in Yick Wo vs. Hopkins, 118 U. S. 370, the term is one of those grand "monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right, essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Judge Story's definition is succinct and acurate: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

In the case of Kennard vs. Louisiana, 92 U. S. p. 481, the sole question was whether the State, acting under statute through the judiciary, had deprived the plaintiff in error of his office without due process of law, and it was there said by Mr. Chief Justice Waite, as the organ of the Court:

"It is substantially admitted by counsel in the argument that such is not the case, if it has been done 'in the due course

of legal proceedings, according to those rules and forms which have been established for the protection of private rights.' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts to proceed at all. This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect."

Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S. 105, said:

"Under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in Kennard vs. Morgan (92 U. S. 480), and, in substance, repeated at the present term, in McMillan vs. Anderson."

Mr. Justice Gray, speaking for the Court in Scott vs. McNeal, 154 U. S. 45, said:

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its Legislature, its executive, or its judicial authorities." (Authorities.)

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that court's construc-

tion of a statute of the territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case this Court must decide for itself the true construction of the statute." (Authorities.)

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

"The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this Court, mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings such validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liabilty of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." (Authorities.)

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized in the custody of the court. (Authorities.) And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some case, as observed by Chief Justice Marshall, 'unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which has never been captured, it could not be contended that this condemnation operated a change of property. * * * Upon the same principle, a decree condemning a vessel for unlawfully taking claims, in violation of a statute which authorized proceedings for her forfeiture in

the county in which the seizure was made, was held by this Court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was."

As applied to judicial proceedings, the apparent settled definition of the phrase "due process of law" is that given by Mr. Justice Shiras, speaking for the Court, in the case of Marchant vs. Penn. R. Co., 153 U. S. 387, in the following language:

"In Hagar vs. Reclamation Dist., 111 U. S. 701, 708, is found the following definition of the phrase: 'It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceedings against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.'

"The phrase implies more than the mere issuance and service of process; it includes the right of being heard in defense of the action brought, and it has been accordingly held that where the Court after summons strikes out the answer of the defendant for contempt and thereafter enters the decree *pro confessis*, such decree will be declared void as being without due process." Hovey vs. Elliot, 167 U. S. 409.

The opinion was delivered by Mr. Justice White, who, on page 414 of the opinion, said:

"In McVeigh vs. United States, 78 U. S., 11 Wall. 259, the Court, through Mr. Justice Swayne, said (p. 267):

"'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It alleged

that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum.

"'* * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice.'

"And quoting with aproval this language, in Windsor vs. McVeigh, 93 U. S. 277, the Court, speaking through Mr. Justice Field, again said (pp. 277, 278):

" 'The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity of being heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. There must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to a notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court in effect not only said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

In the instant case the charter of the association is assailed for nullities involving the non-existence of the association as a corporate body. The charter is the act, the contract of the corporators who adopted and signed it. The associated body was not in existence at the time of its adoption and confection. It did not come into existence till after the charter was adopted, and only when it was carried into effect. The thing sought to be declared null is the contract of the corporation alone, and they alone are interested in the maintenance of the charter against the nullities charged. They are the real and actual defendants to the action brought.

Indeed, if the theory of the State in the petition be true, that the charter of the association is null and void *ab initio* on the grounds stated, there is and never was a body corporate in existence which could be summoned or made defendant to the action. Under the express provisions of the statute of the State, C. C. 446, it could only be brought or prosecuted against all the corporators in their individual names who compose the association. They are the only defendants who could be summoned or proceeded against in the case. None of them were ever summoned or notified or in any manner made parties to the action in which the judgment complained of was rendered. The law expressly entitled them to notice before the judgment could be rendered. As said in Hovey vs. Elliott (415), "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made. A denial of a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and defective proceeding had better be omitted altogether."

Again, as we have seen, the writ of injunction which was ordered and issued on March 2, 1899 (R. 388, 389), was issued as a preliminary writ, "until the further order of the court." It was issued upon the special allegation of the supplemental petition

that day filed by the State. If the concluding phrase, "until the further order of the court" does not mean until the defense against the injunction could be heard upon the special grounds set up for the writ in the supplemental petition filed, we cannot conceive what object it can be applied to. It was ordered and issued on the same day final judgment on the principal demand was entered for the State. Six days later, on March 8, without any notice or other proceedings or hearing whatever had, upon the grounds laid upon which it was claimed, the writ was perpetuated in the final judgment signed on March 8 (R. 389) by the insertion of the following clause:

> "It is further ordered that the injunction heretofore issued, prohibiting and restraining said company, its officers, directors, agents, and representatives, from removing the assets and funds of said company from this State or beyond the jurisdiction of this court, from receiving any money or installments from its debenture-holders, from paying out any money on surrenders or withdrawals or in redemption of debentures, from making loans on and from forfeiting any of said debentures or the rights of any of the holders thereof, be now confirmed and made absolute; and it is further ordered and adjudged that said company, so called, its officers, agents, representatives, and members, be further perpetually enjoined and restrained from acting in a corporate capacity."

As said by the court in the above cited case, "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial decree."

Whilst this clause perpetuating the injunction was incorporated in the judgment as signed on the 8th, the supplemental petition was not filed and the injunction under it was not issued until after the court, on the 2d, had orally rendered judgment in favor of the State; hence, the above clause did not and could not form part of the judgment as rendered on the 2d. It was added to the judgment orally rendered, and incorporated in the judgment when it was signed on the 8th. In the phraseology of the court, in 29 An. 91, this "seems to us most extraordinary and in excess of judicial authority." "The course which the judge pursued in

this case was manifestly in violation of the law laid down in the Code of Practice." This is not all, however. The substance of this posthumous clause in the judgment is open to objection not less serious and vital. It includes matters which were not involved in the case when the evidence was adduced and the argument made; it is matter brought into the case and incorporated in the signed judgment after the trial of the case had been finally closed. It included matters of substance of grave and serious consequence which were not in issue on the trial previously had, and which had not been included in the defense made, and which should have been submitted to defense by the parties to be affected and the deliberate consideration of the court before being sealed with the authority and the unimpeachable verity of the solemn final judgment of a court. The judgment confirms and makes absolute matters which were not involved during the trial. It prohibits and restrains not only the company which alone was before the court, but also its officers, directors, agents and representatives who had not been cited from removing the assets and funds of the company from the State or beyond the jurisdiction of the court. In legal effect this was a judicial sequestration of the property. Virtually the officers, directors, agents and representatives of the company are made the keepers of the property under the direction and authority of the court, the right and power of the court to control the destination of the property being necessarily implied by the terms of the judgment.

In addition, the parties are prohibited and restrained "from receiving any money or instalments from the debenture holders, from paying out any money on surrenders, or withdrawals, or any redemption of debentures; from making any loans on and from forfeiting any of said debentures or the rights of any of the holders thereof."

This involves an interdiction of the right or power of the persons representing the company from protecting their own rights or interests under contracts made in the name of the company. If, indeed, as decreed by the court, the company is not an organized

corporate body, a juridical person, then the property used in the common affairs and the contracts made in the company's name are those of the individuals composing it. The right of such owners to possess their own property and control their own contract rights and interests is not forfeited or divested by the judgment decreeing that the company is not a legally organized body or a corporation. Such a judgment does not relate or affect the tenure of the members of the association over their property interests or rights under contracts with third persons. Through the instrumentality of this injunction, which the judgment confirms and makes absolute, large sums and amounts in the possession of the members of the association chosen by the parties in interest as their trustees to administer them, are brought under control and administration before the court without process against or judicial notice to the persons in interest or their trustees. The effect of the injunction is still more far-reaching. It affects the legal rights of creditors, the debenture holders, who have the right, under their contracts, at any time, if they choose to do so, to surrender their debentures and to receive from the association, whether it be a corporation or not, the cash surrender value thereof—a right which they can no longer be permitted to exercise under the injunction, although the members of the association are willing, anxious and able to accord them the full benefit of the contract. It is the law that the State, without pecuniary interest and not being a party to the contracts, can thus intervene between parties and judicially enforce by injunction a violation of the obligations of their contracts?

And can the State, without interest in the property, through the instrumentality of her suit to have the incorporating charter of an association of her citizens declared null and void, take from them such property, or divest them of its custody or administration? The excuse urged for the exercise of such extraordinary powers is that it is the duty of the State to do so to protect the rights of debenture holders and creditors of the association on her theory that it is insolvent, and, hence, its creditors are in danger of losing

upon its obligations to them. Such is the doctrine of paternalism. No such principles are recognized under our form of government. In the first place, the law requires express and special authority to represent another by a suit in court, which is not pretended the State has from those whose rights and interests are championed. The State, except as their authorized agent, has no right to appear for them, for the plain reason that the law provides them an adequate remedy in their own names to enforce their own rights and no reason exists why they should not do so in the regular and ordinary course. On the other hand, there are serious and grave reasons why the State should not do so. She would have to discriminate between citizens to exercise such powers. When the sovereign State appears in court for the enforcement or protection of sovereign rights, by common consent, enacted into law, she is exempt in her own courts from giving the bonds or security required of all other suitors. But why is she so exempt? Because she is the sovereign power representing the common rights of all. But can she, in her sovereign capacity, lay claim to such exemption when she appears representing a citizen or a number of citizens in the enforcement of their individual rights? Such exercise of the sovereign power is incompatible with all our ideas of the high functions of our governmental structure. Its chief object is the good of the whole, and when it assumes other functions it is usurpation and oppression; says the preamble of our State Constitutions.

No legal grounds exist upon which the State can found any legal right to claim at the hands of the court the injunction issued for the purpose of taking charge of the assets or assuming control over the business and affairs of the defendant company. In none of the circumstances of the case can we find any legal grounds for the exercise by the court of its discretion or power at the suit of the State alone, to take, through the instrumentality of such an injunction from the possession and control of the Board of Directors of the defendant company, the property and assets belonging to it or belonging at least to the persons composing the

company. Should we even concede for the purposes of this argument that the State will recover a final judgment, declaring the nullity of the company's charter still, the State being without any interest as owner in or as creditor upon the property or assets of the company, is without any legal right to demand such remedies. She is not in a position to enter upon any investigation or to invoke any relief upon the subject.

It appears to be the notion inculcated in the State's petition that its right to demand, as well as the duty and right of the court to issue, the injunction to take the possession of the property and to assume the control of the affairs of the company, results as a necessary sequel, as an absolute right, from the supposed recovery of a judgment by the State decreeing the nullity of the company's charter. No such consequences arise from such a judgment. It is one thing to be entitled or not to be entitled by law to use or exercise a corporate franchise, but it is a very different matter to be entitled by law to the possession and control of one's own private property and business affairs. Let us not ignore this plain distinction. Assume, if you will, that the court will finally render judgment in the case affirming the nullity of the charter; that the company is without legal right to be or continue as a corporation; the fact still remains that the common assets and property interests involved are not thereby forfeited or escheated to the State. They still belong in common to the persons composing the company, whose title still remain vested and under the same protection of the law as other property.

> "The association of colored persons is not a corporate body. Although they have no legal existence as a corporation, as individuals they are entitled to their rights of property in what may have been acquired in the corporate names." African M. E. Church vs. City of New Orleans, 15 An. 541. Reaffirmed, 37 An. p. 489.
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> "It is an error to suppose that the expiration of the charter of a corporation carries with it the destruction of the ownership of the property which the corporation held during its existence." Fleitas vs. City, 51 An.—; 24 So. Rep. (No. 20,) 629.

Neither will the nullity of the charter of the company in which it may be invested, involve or operate the forfeiture of the property used by the company. Neither is the right to the possession or the control of the property forfeited thereby. This applies with peculiar emphasis to companies organized as private corporations for purely business purposes, in which the corporate franchise—if it may be called a franchise—consists of the authority of the law to pursue purely private avocations or business enterprises in that form and under the limited liability described. The charter of the company expressly provides that whenever it is dissolved from any cause "its affairs shall be liquidated under the superintendence of the Board of Directors." This is the arrangement made and stipulated by and between the parties in interest for the settlement in the manner agreed upon of purely personal business matters between themselves. It is clear that such matters of purely private and personal interests, involved exclusively, between the parties in interest, is a private and not a public matter. It is equally clear that the State has no interest in the subject matter of such a settlement, except possibly as a body politic it always has an interest in promoting obedience to the laws and the performance of legal duties and obligations. But such public interest is the political and moral one attaching to sovereignty, and is widely different from a private and special interest in particular things. A litigant who has no actual or substantial interest in the subject matter of the relief sought cannot be prejudiced by the dismissal of the action for such relief. The Code of Practice prescribes, Art. 15:

> "An action can only be brought by one having a real and actual interest which he pursues."

It is conceded that the law affords ample remedies *inter sese* to the parties in interest for whatever relief they can establish between themselves. Under such circumstances it is not seen how the State can interfere to disturb the arrangement made by the parties themselves for making the settlement in the way agreed upon, included in the charter. A sound public policy requires

that whatever exclusively pertains to individual interests should be left to the individual to control in his own interest, and that the State should provide and care for the general or public interests and such as are beyond the control of the individual. It is certainly true that to the extent that the individual can, with safety to all others, be permitted freedom to manage his own affairs, governmental intervention is both unnecessary and inexpedient. Paternalism in the government is to be cautiously guarded, lest it subvert the just rights and liberties of the individual and there can be no good reason why the sovereign should act in individual interest when the government has afforded ample methods and liberty for him to act for himself.

The right of the State to proceed in civil actions before her own courts in cases, like the one in hand, in which she has no direct or immediate interest, either pecuniary or prerogative, was ably considered by Chief Justice Earle, in an elaborate opinion delivered by him as the organ of the court, in the case of People vs. Lowe, 117 N. Y. 175-190, from which we make the following excerpts:

> "The people of the State, like all other parties to actions, must show an interest in the subject matter of the litigation to entitle them to prosecute a suit and demand relief."
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> "The people of this State have no general power to invoke the action of the courts of justice by suits in their name of sovereignty for the redress of civil wrongs sustained by some citizens at the hands of others. When they come into court as plaintiffs in a civil action, they must come upon their own right for relief to which they are themselves entitled. It is not sufficient for the people to show that wrong has been done to some one. The wrong must appear to be done to the people in order to support any action by the people for its redress."
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> "The Attorney General, in an action brought by him, represents the whole people and a public interest, and not merely individuals and private rights."

On page 193 the court, after a review of the authorities on the subject, said:

> "Suits like this are a new invention. We believe they were unknown to the generation of statesmen, judges and lawyers

living at the time of the adoption of the Revised Statutes, and for more than fifty years after that time no trace of such an action can be found in the reports of this State."

On page 195 the court said:

"Neither public nor private interests require the maintenance of such a suit as this. The private parties who feel aggrieved in such cases have ample remedies to redress their wrongs by proceedings in their own names; and why should not the complaining members of this corporation redress them in that way at their own expense and risk?"

Possibly the strongest and most pertinent case to be found in the list of reported cases is that of Havemeyer vs. Superior Court of California, 10 L. R. A. 627-650, rendered in 1890 in the Supreme Court of that State. In that case the Attorney General of the State had proceeded against and had recovered a judgment in the name of the People against the American Sugar Refining Co., a corporation of that State, forfeiting its charter. On the same day the judgment was recovered, the Attorney General filed his rule for the appointment of a receiver, who was appointed by the court. Thereupon, application was made to the Supreme Court, for the writ of prohibition to the Supreme Court, and the receiver appointed, to restrain any further proceedings under the order of the court. The grounds upon which the writ was applied for among others included the right or jurisdiction of the Superior Court to make the appointment under the statutes of that State in the case where only private or individual interests were involved. The jurisdiction of the Superior Court to make the appointment was denied, and the writ of prohibition was made peremptory by the Supreme Court after a most exhaustive opinion rendered upon the subject. The statute of that State provided that: "A receiver may be appointed * * * when a corporation * * * has forfeited its charter." The Supreme Court there held (Syllabus): "A receiver of a dissolved corporation is only to be appointed *when necessary for the purpose of preserving and distributing the property, and only on application of a party interested, viz., a creditor or stockholder.*" (Our

italics.) "The forfeiture of the charter of a corporation does not under Code Civ. Pro., No. 154, *et seq.*, authorize the appointment of a receiver on application of the State as a part of the penalty of forfeiture."

In discussing the right of the State to apply for the appointment of a receiver in cases where she has no direct interest; the right of stockholders to possess and control the common assets and property of the association; and the right of the State to appoint a receiver to take the property and break up the business of the corporation as a punishment for a misuse or abuse of the franchise, the Court, at page 640 (L. R. A.), said:

> "But, to our minds, the gravest objection to the doctrine lies in the consequence which it involves. Obviously, there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the Court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works. However vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership, for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property and again putting it into the combination. It must, therefore, be divided up and scattered, and its value in great measure destroyed. The stockholders when they finally realize upon their property must be content to receive, not the proceeds of a well-appointed factory, in complete running order, but the price of a lot of old iron and second-hand machinery sold in lots according to the discretion of a receiver, acting with a view not to their interest as stockholders, but solely with a view to the interest of the public in punishing them. We cannot assent to such a doctrine, involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for cor-

porate transgressions, let the Legislature take the matter in hand. It is no part of the function of a Court to supply the want of penal legislation. Its judgments in such case, besides wholly unauthorized, would always operate as bills of attainder, or *ex post facto* laws, both of which are not only abhorent to our ideas of justice, but are expressly forbidden by our charters of government. But perhaps it is not fair to regard the doctrine under discussion as implying that the primary object of the laws, as it construes them, is the punishment of the stockholders. It may be said that the real purpose is only to break up the monopoly, and that the punishment involved is merely incidental and unavoidable; that it is right to break up the monopoly, and if, unfortunately for them, the stockholders suffer in the process, they have themselves alone to blame. Regarded from this point of view, it seems to us that the doctrine is still wholly indefensible. When a corporation is dissolved, its property, as we have seen, rests in its stockholders, subject only to the claims of creditors, and is therefore held upon the same tenure and subject to the same conditions as similar property owned by other natural persons. What others may do they may do. They owe no further or higher duty to the public and are under no other restraints. Therefore, unless some ground can be shown upon which the State can take a sugar refinery away from a private citizen who has inherited or bought it or built it, and can shut it up preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizen owning another refinery to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the State in taking similar property from natural persons who have succeeded thereto on the death of the corporation. Confessedly, there is no warrant to be found for such a proceeding in case of a natural person * * *. What is forfeited to the State and all that is forfeited is the charter—the right to be a corporation, and this is presumed solely upon the ground that the condition upon which it was granted was violated. The doctrine is that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage of the State. If this condition

is broken, the charter which the State has given is taken back by the State, but the property which the corporation has acquired with its own means goes to those who have paid for it, and they have the right to deal with it, just as others similarly situated may deal with their property.

"The conclusion which inevitably follows from these views is that in an action under Sec. 802 *et seq.*, of the Code of Civil Practice, the rendition of the judgment authorized by Sec. 809 ends the proceedings so far as the Superior Court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or a stockholder of the corporation." P. 641.

Under these views and the above quoted authorities we are impressed with the conviction that the writ of injunction issued on March 2, 1899, and perpetuated in the final judgment signed on March 8, is not valid or binding; but being so issued and perpetuated without notice to or hearing by the parties against whom it was directed and perpetuated, both the writ and the judgment perpetuating it are utterly null and void, as being without due process of law.

Certainly the writ and judgment were not issued and perpetuated in that due course of proceedings according to the rules and principles established in the State's system of jurisprudence for the protection and enforcement of such private rights. 95 U. S. 33; 19 Wall. (U. S.) 107.

In such cases it is imperative that there be a court of competent jurisdiction; that the proceedings be regular and appropriate to the judgment sought.

"Certain it is that in judicial proceedings due process of "law must be a course of legal proceedings according to those "rules and forms which have been established for the pro- "tection of private rights; it must be one that is appropriate "to the case and just to the parties affected; it must be pur- "sued in the ordinary manner prescribed by the law; it must "give to the parties to be affected an opportunity to be heard "respecting the justice of the judgment sought; it must be

"one which hears before it condemns, proceeds upon enquiry "and renders judgment only after trial." Burton vs. Platter, 10 U. S. App. 657. See also 96 U. S. 97.

"It has been said that the terms 'due process of law' and 'the law of the land' refer to the pre-existing rule of conduct, and they are intended to secure the individual from the arbitrary exercise of the powers of the government unrestrained by the established principles of procedure and distributive justice, this object being obtained where the laws operate on all alike. These guarantees are intended to protect property from seizure, forfeiture or destruction without a trial and conviction by the ordinary modes of judicial procedure." 68 Alabama, 58.

We submit to the court that such proceedings are not "due process of law" within the meaning or intendment of the 14th amendment. More especially is this true when we consider the far-reaching effects produced by this injunction. It is in effect a judicial sequestration of the common assets and property of the association as well as an interference in contracts between the agents and representatives of the association with various third persons not parties to the suit or before the court, by prohibiting and restraining them "from receiving any money or installments from debenture-holders, from paying out any money on surrenders or withdrawals or in redemption of debentures, and from making any loans on or forfeiting any of said debentures or the rights of any of the holders thereof." This deprives the parties in interest of the right or power to comply on their part with their contracts made with third persons or to exact compliance by such third persons with the obligations of their contracts made with them. It deprived the members of this association of all power to control the property or contract rights belonging to the association in a suit in which the owners of the property and the persons in interest were not even parties to the suit. They were in this way deprived of their liberty and their property without any process of law against them whatever and in violation of the plain terms of the prohibitions contained in the 14th amendment of the Constitution of the United States. Besides, the injunction operated an in-

fringement by the State of the obligations of contracts between third persons not parties to the suit and in which the State had not the slightest interest. Through the instrumentality of this injunction the State coerces and compels the violation by the parties of the obligations of their contracts between each other and that too without the presence of the parties or an opportunity extended to them to be heard upon the subject matter of such contracts.

Legality of the Business Pursued.

It is contended that the debenture business pursued by this association is unlawful and in contravention of the laws of the State. To the contrary there is no statute of the State denouncing or prohibiting the pursuit of the debenture business in the State. Besides, the business is recognized by the Legislature of the State in the Act No. 171 of 1898, p. 407, as a legitimate calling or pursuit. It is there recognized among the authorized trades, professions, occupations and avocations pursued in the State and a graded license tax is levied for the privilege of its pursuit.

Sec. 1 of the Act (p. 387) provides that:

> "There is hereby levied an annual license tax for the year 1899, and for each subsequent year, upon each person, association of persons, or business firms and corporations pursuing any trade, profession, avocation, calling or business, subject to license under Article 229 of the Constitution."

Section 10, pages 407-8, provides:

> "Each and every company, association, corporation or firm, conducting the business of a debenture-redemption company, or loan and investment companies, whether domiciled in or out of the State, but authorized to do business herein, shall be subject to an annual license based upon the gross receipts, as follows, to-wit."

The business is divided into ten classes under above provision, and the license is classified for the different grades, running from $3,000 for the highest, down to $75 for the lowest grade. It will be observed that the license is levied upon the business pursued by this company, and that it is denominated "the business of a de-

benture-redemption company," the identical name of the business pursued by the defendant company in this case. But the argument of the State that the right to pursue this business was not recognized under this statute, because of the phrase included in it "whether domiciled in or out of the State, *but authorized to do business herein,*" is that the license was levied by the State if the company should pursue the business for only a short time, and that, too, whether the pursuit of the business was a right recognized by law or not, and that the phrase included in the statute, "*but authorized* to do business herein" was a reservation inserted, whereby the State could claim, notwithstanding the license exacted, that the right to pursue the business was not authorized by law. The obvious intention of including this phrase in the license law was to apply to corporations organized outside of the State, and which are prohibited from doing business in the State under Article 264 of the Constitution of 1898, without first complying with legal requirements. As we understand it, the argument is that the levy of the license under this Act is not a recognition of the legal right to pursue the business, that the State has a right to collect her license for its pursuit although the business be illegal under the laws of the State. We cannot assent to such a doctrine. It is the province of the State to prevent the pursuit of businesses or avocations, deemed illegal, vicious or immoral by her laws, and it is not her pleasure to countenance illegality or wrongdoing by placing a price upon the privilege to practice such. We believe it is the first time we have heard the contention made that the State by her revenue laws can sanction or countenance illegal pursuits. The State, as the embodiment of sovereign power, cannot become a party to an illegal act or pursuit, or an accessory to the violation of her own laws.

Certainly the convention that framed the Constitution meant and intended, by Article 229, those trades, professions, avocations and callings which are recognized and authorized by law, and did not intend to authorize the Legislature to sanction the violation of law by licensing illegal or immoral pursuits.

The license is an annual tax upon an avocation or pursuit, and it would savor of bad faith in the State to accept the license for the privilege of doing business for one year, to deny the person the privilege of pursuing the business during the time he had paid for. It is contended that the State is entitled to the license if the business be pursued but for a single day. We assent to this, but the privilege to pursue the business for the entire year is included in the license, and if the licensee chooses to pursue it but a single day, he cannot for that reason claim reduction of the amount charged by the State for the privilege to the license. We cannot see how the State can be justified in accepting the license of $3,000 from the defendant company for the privilege to pursue its debenture business in this State for the entire year 1899, and maintain the judgment of the lower court in this case, prohibiting the company from going on with the business. The rule would be different where the tax collector by whom the license is collected, makes a mistake and issues a license to one not by law entitled to them, or to one in pursuit of an illegal business, which the law does not expressly license. In such cases, the licensee will acquire no right to pursue the business under a license which the law does not authorize. But that is not the case here. The Act expressly designates: "the business of a debenture-redemption company," for the pursuit of which the license is levied, and this is professedly the business pursued by this company, and hence is a business expressly designated by law; by the Legislature itself. The Legislature is the department of the government to which the Constitution expressly delegates the power to act in the matter, and by its act "the business of a debenture-redemption company" is recognized and licensed as among the several trades, professions, avocations and callings mentioned in Article 229 of the Constitution as being pursued by the persons from whom the license tax is to be collected.

Certainly the Legislature contemplated that "the business of a debenture-redemption company" would be pursued in this State by resident, as well as non-resident companies, when it graded the

license tax into ten different classes, and fixed the amount which should be collected for the several classes. It provides:

> "First Class. When the gross receipts are $300,000 or more, the license shall be $3,000."

We cannot conceive how the Legislature could imagine that the gross annual receipts could amount to $300,000 in the "business of a debenture-redemption company," when the State will not allow the business to be pursued at all. Had it been the intention of the Legislature that the pursuit of the business should be prohibited and suppressed, instead of fixing the amount of the license tax which should be charged for the pursuit of the business, it would have fixed in the statute prohibiting it, the amount which should be inflicted as a fine for the violation of its prohibition. The Act cannot be construed in any other light than as a legislative classification and recognition of "the business of a debenture-redemption company" among the several trades, professions, avocations and callings which are pursued by persons and corporations in this State, and in reference to which it has power to levy a graded license tax, as expressly delegated by Article 229 of the Constitution. The Legislature is the body which possesses the power to establish the public policy of the State on this subject.

> "The public policy of the government is to be found in the statutes, and when they have not directly spoken, then in the decisions of the courts, and the constant practice of the government officials; but when the law-making power speaks on a particular subject for which it has the power to legislate, the public policy in such a case is what the statute enacts." U. S. vs. Trans-Miss. Frt. Assn., 166 U. S. 340.

Instead, therefore, of the business "of a debenture-redemption company" being denounced or prohibited by law, as assumed in the petition filed in this case, it is a legitimate business, recognized by the Legislature, and authorized under the license tax imposed by the State for its pursuit.

If we be correct in this position that the debenture business assailed in this action is a lawful business, one authorized and spe-

cially recognized by the act of the Legislature of the State, then the established policy of the State upon the subject of its legality as thus established is binding by the courts and the judgment the District Court rendered in this case deprives this association of the equal liberty, privilege and immunity of pursuing a lawful business or enterprise within the State in violation of the prohibitions contained in the 14th amendment.

It is rather a singular coincidence in this case that the State is here suing to annul the charter of this association in the interest of the various purchasers of its debentures and because the State or her Attorney General fears that such purchasers and debenture holders may lose a part or the whole of the funds invested in the purchase of its debentures and fears that they may be defrauded under contracts made with the association, when it appears that not a single one of the debenture holders are complaining in his own interest. All the parties in interest connected with the business of this association appear to be fully satisfied, not only with the feasibility of the plan, but with the solvency of the company and its ability to finally comply with all of its financial obligations. Not only this, the Legislature of the State recognizes the legitimacy of the business and authorizes its pursuit by levying a graded tax for the privilege of pursuing the business under an express article of the Constitution of the State authorizing such legislative action. The State, the only party apparently dissatisfied, without any interest in the business pursued or under the association organized in her own name in a civil action before her own courts brings this civil action to annul the charter of this association and to place its assets and property interests under the control of the court for the purpose of breaking up the parties engaged in the business. It cannot be the object of the State to prevent others from engaging in the same business and pursuing it within her limits because a judgment in her favor in this case cannot produce such a legal effect.

The judgment in favor of the State in this case can bind no one except the particular company named and summoned as the de-

fendant in the action. It could not affect a different company subsequently organized even by the same corporators for the pursuit of the same business. At most the judgment rendered in this case could be invoked as a precedent; it could not be plead as a bar or estoppel against the right to organize for such a purpose.

In this case the State without any interest in herself either pecuniary or prerogative in a matter involving only the personal, private rights and interests between citizens, brings this suit ostensibly in the interest and for the benefit of the creditors of the association to annul its charter and to break up its business, and that too in contravention of the plain terms of the article of her Code of Practice and in the face of an Act of the Legislature authorizing the pursuit of the business. No precedent is to be found upholding the right of the State to proceed in such a manner and her proceedings in this case are without authority of law and hence not due process of law.

In the next place the only defendant cited or summoned to defend the action is the association in its corporate name and capacity which she herself in effect alleges is non-existent, and against whom she proceed to judgment without citing or summoning and without the presence or appearance of the only parties defendants known to the law to defend the action. The judgment on its own face is against a defendant whom it solemnly decrees has no legal existence, whilst the real parties defendants to the action are neither cited nor summoned. Such proceedings cannot be said to be due process of law. The court that rendered the judgment had before it neither a qualified plaintiff to stand in judgment nor any defendant at all against whom the judgment could be rendered or enforced. The judgment is ostensibly against the company, but in reality is aimed at those persons denominated its officers, agents and representatives, none of whom are individually made parties to the suit. It is absurd to say that persons can be the officers, agents or representatives of a corporation not in existence. There can be no agent or representative of a so-called principal having no existence in fact. In such cases

the law of the State expressly provides that the persons composing the association must be cited and summoned in their individual names.

Finally, after the trial of the case had been closed the State applied for and obtained a writ of injunction under which the assets and property of the owners were taken from under their control and the obligation of contracts was violated without any process or hearing whatever, and by which this association and the members composing it without process of law have had their property taken from them and their right to deal with it as they please as all other persons are entitled to do denied and taken from them.

We respectfully submit that the judgment of the Supreme Court of Louisiana affirming the judgment of the District Court rendered in this case should now be annulled, avoided and reversed under the writ of error issued in this case and that there should be judgment declaring said proceedings had before the courts of Louisiana to be without due process of law and null and void and of no effect, and the plaintiffs in error further pray for all orders and decrees necessary in the premises and to which they are by law entitled, and for all costs of suit and for general relief.

Respectfully submitted,

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